United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

For the District of Columbia Circuit

995

No. 17,583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 15 1963
Nathan J. Paulson
CLERK

JOHN J. ABT
320 Broadway
New York 7, N. Y.,

JOSEPH FORER
711 14th Street, N. W.
Washington 5, D. C.
Attorneys for Appellant

Questions Presented

1. Whether the registration requirements of the Subversive Activities Control Act and the regulations thereunder violate the privilege of appellant's officers and members against self-incrimination.

2. Whether appellant can constitutionally be convicted for failing to file the registration form prescribed by the Attorney General requiring it to describe itself as a Communist-action organization.

3. Whether sections 7 and 15 of the Act unconstitutionally denied appellant a judicial trial on the issue of whether it is a Communist-action organization.

4. Whether the trial court denied an adequate voir dire examination of the prospective jurors.

5. Whether appellant, not having registered under section 7(a) of the Act, was required to file a registration statement pursuant to section 7(d).

6. Whether the cumulative sentences violate the prohibition of the Eighth Amendment against excessive fines and the due process clause.

7. Whether the indictment should have been dismissed because of the presence of government employees on the grand jury or, in the alternative, whether the court below should have conducted a hearing on the qualifications of the grand jurors.

8. Whether the jury should have been instructed that a guilty verdict required finding that the failure to register and file a registration statement was actuated by an evil purpose and was without a justifiable excuse.

9. Whether appellant's conviction for failing to file a registration statement was erroneous because the statement makes demands which are excessively vague and calls for information which appellant cannot obtain.

INDEX

Citations

* Cases or authorities chiefly relied upon are marked by asterisks.

PAGE

Cases (Cont'd):

PAGE

Cases (Cont'd):

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 17,583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment of the United States District Court for the District of Columbia, entered on December 18, 1962, convicting appellant of violating sections 7 and 15 of the Subversive Activities Control Act (herein called the Act), 50 U. S. C. 786 and 794 (J.A. 76). Notice of appeal was filed on December 26, 1962 (J.A. 77). The District Court had jurisdiction under D. C. Code 11-306. Jurisdiction in this Court is conferred by 28 U. S. C. 1291 and 1294.

Statement of the Case

The Act provides for proceedings before the Subversive Activities Control Board (herein called the Board) on a petition of the Attorney General to determine whether an

accused organization is a "Communist-action organization" and should be ordered to register (sec. 13). Upon Supreme Court affirmance, a registration order becomes final ten days after issuance of the mandate (sec. 14(b)). Within thirty days thereafter, the organization is required to register and to file a registration statement with the Attorney General in such form and manner as he may, by regulations, prescribe (sec. 7). Failure to register is punishable by a fine of $10,000, each day of failure constituting a separate offense. Failure to file a registration statement is punishable by a fine of $10,000 without cumulation. Sec. 15(a).

The indictment, returned December 1, 1961, is in twelve counts (J.A. 1). Counts I through XI charge, as separate offenses, that appellant "willfully and unlawfully" failed to register as a Communist-action organization on November 20, 1961, and on each day thereafter to and including November 30, 1961. Count XII charges that appellant "willfully and unlawfully" failed to file a registration statement.

The District Court denied appellant's motion to dismiss the indictment and for a hearing on the qualifications of the grand jurors (J.A. 17).

By agreement of counsel, approved by the court, government employees were excluded from the petit jury (J.A. 18). The trial judge refused to ask the jury panel on voir dire various questions submitted by appellant to explore the existence of bias (J.A. 21-27, 31).

The facts are not in dispute. The evidence consists of stipulations and the testimony of one government witness.

Appellant is and at all relevant times has been an unincorporated association having headquarters at 23 West 26th Street, New York City (J. A. 50).

On April 20, 1953, the Board, following hearings on a petition of the Attorney General, found appellant to be a

Communist-action organization and ordered it to register under section 7 of the Act. The Board's order was eventually affirmed by the Supreme Court on June 5, 1961 (*Communist Party* v. *S. A. C. B.*, 367 U. S. 1).[1] The Supreme Court's mandate issued on October 10, 1961.[2] Under Section 14(b) of the Act, the order of the Board became final on October 20, 1961. Notice to that effect was published in the Federal Register on October 21, 1961 (J.A. 51). Accordingly, the deadline for appellant's registration was November 19, 1961.

On June 8, 1961, three days after the Supreme Court decision, a press conference was held at appellant's headquarters in New York City. Gus Hall, not otherwise identified by the evidence, presided. He declared that the Communist Party did not intend to register, that he and his associates were not going to be stool pigeons and informers, and that they would rather spend the rest of their days in jail than betray the trust of a single member or supporter. Hall also stated that the Communist Party had never been charged with advocating violent overthrow of the government, sabotage or subversion, and he characterized accusations to the contrary as "the big lie." He added that the Supreme Court had not gone into the regulations issued under the Act and that these raised serious constitutional questions which the lawyers would have to consider (J.A. 33-38).

---

[1] This Court initially affirmed the Board's order on December 23, 1954. *Communist Party* v. *S.A.C.B.*, 96 App. D. C. 66, 223 F. 2d 531. On April 30, 1956, the Supreme Court reversed and remanded the case to the Board. 351 U. S. 115. Reaffirmation by the Board of its order resulted in a second remand by this Court on January 9, 1958. 102 App. D. C. 395, 254 F. 2d 314, modified by an unreported memorandum of April 11, 1958. The action of the Board in again reaffirming its order was affirmed by this Court on July 30, 1959, 107 App. D. C. 279, 277 F. 2d 78, and thereafter by the Supreme Court's decision of June 5, 1961.

[2] It had been stayed pending action on a petition for rehearing which was denied on October 9, 1961. 368 U. S. 871.

Under the amended regulations of the Attorney General, effective October 7, 1961, registration is accomplished by filing with the Attorney General what is designated as a "registration form" (IS-51a). This form calls for the name and address of the registrant and a declaration that it "hereby registers as a Communist-action organization." The amended regulations also require the filing of what is designated as a "registration statement" (form IS-51). The registration statement again calls for the registrant's name and address, as well as for the names of the registrant's officers and members, and the information concerning its finances, and printing and duplicating equipment specified in section 7(d) of the Act. (Appendix, *infra*, p. 12a; J.A. 56-63.)

On November 10, 1961, appellant mailed a letter to the Assistant Attorney General, Internal Security Division, Department of Justice,[3] which was received in the Department the following day and by the Internal Security Division on November 13. The letter was on appellant's printed letterhead, carrying its name and address. The letter bore the typewritten subscription, "Communist Party of the United States by its authorized officers" and appellant's seal. The letter stated that each of appellant's officers declined to sign or file, or to authorize the signing or filing of, forms IS-51 and IS-51a in the exercise of his Fifth Amendment privilege not to be a witness against himself. The letter further stated that the officers had adopted this means of asserting the privilege because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege. In addition, the letter stated it to be the conviction of appellant and its officers that appellant is not a Communist-action organization (J.A. 70-71).

---

[3] Section 11.100 of the regulations require that communications respecting registration be addressed to him.

On November 17, 1961, the Assistant Attorney General in charge of the Internal Security Division replied to appellant's letter by a telegram which was received the same day. The telegram denied the claims of privilege made in the letter and stated that the letter was rejected as full or partial compliance with the registration requirements of the Act (J.A. 70, 72).

Appellant, did not, prior to December 1, 1961, the date of the indictment, file form IS-51 or IS-51a with the Department of Justice (J.A. 73).

Appellant's motion for a judgment of acquittal, made at the close of the evidence, was denied (J.A. 38).

The trial judge instructed the jury that appellant would be criminally liable for failing to register and file a registration statement if the failure "was knowing and intentional and not inadvertent and accidental * * * irrespective of what the defendant's mental attitude or purpose or mental operation might have been," and that it was no defense that appellant and its officers believed that they had a legal right not to file the forms (J.A. 43, 46).

The judge refused appellant's request to charge that appellant was guilty only if its failure to file the forms was wilful in the sense of having an evil purpose and being without a justifiable excuse. He also refused an alternative request to charge that the required criminal intent would be absent if appellant's failure to register was actuated by a good faith belief that it had a constitutional right not to do so (J.A. 73-75).

Appellant was convicted on all twelve counts of the indictment. The court imposed the maximum fine of $10,000 on each count (J.A. 76).

Statutes and Regulations Involved

The pertinent provisions of the Subversive Activities Control Act and the regulations of the Attorney General are set forth in the appendix to this brief.

Points on Appeal

1. The District Court erred in denying the motion to dismiss the indictment and each of its counts.

2. The District Court erred in refusing to ask on voir dire examination of the jury panel questions submitted by appellant.

3. The District Court erred in denying the motion for judgment of acquittal.

4. The District Court erred in instructing the jury.

5. The District Court erred in denying requested instructions to the jury.

6. The District Court erred in imposing excessive and cumulative sentences.

Summary of Argument

I.

The registration requirements of the Act and the regulations violate the privilege of appellant's officers against self-incrimination.

The Supreme Court held that it was premature to decide this issue on review of the Board's order. However, the Court recognized that the issue would be reached in a prosecution of appellant for failure to register.

A.

Compliance with the registration requirements would compel appellant's officers to incriminate themselves in two respects.

1. If an officer signs the registration documents, showing his position, he discloses the incriminating fact of his identity as an officer. The same result follows if the documents are signed in the alternative manner—*i.e.*, by any person who certifies that he is authorized to act for appellant. Since this authority can be given only by appellant's officers, at least one officer must disclose his membership to the "other person". The Fifth Amendment, however, prohibits the government from compelling the making of an incriminating admission to anyone. Moreover, the "other person" might communicate the incriminating admission to the government, voluntarily or by compulsion.

The "other person" alternative is also unworkable. It imposes on the officers the impossible task of finding some one sufficiently foolhardy to incriminate himself by divulging a connection with appellant and to risk prosecution for errors in the documents.

2. Every item of information required by the two registration documents incriminates the officers who supply it. All the items are relevant to possible prosecution under the Smith Act and section 4(a) of the Act. In addition, notwithstanding section 4(f), the incriminating documents are admissible in evidence against the officers as proof of all facts stated therein other than the facts that they are officers and members of appellant. The requirement that the officers supply the information called for by the registration documents cannot be reconciled with the privilege under the doctrine that an officer may not refuse production of his organization's records because their contents incriminate him. The doctrine does not apply to the preparation and

filing of original statements, such as the registration documents. Also, the documents call for information which may not, and probably does not, appear in the organization's records.

B.

The privilege of the officers was claimed without naming them in appellant's letter to the Assistant Attorney General and in the motion to dismiss the indictment. Naming the officers would have revealed the incriminating fact of their identity as officers and would also have waived their privilege. The claims of the privilege in the form in which made must be regarded as sufficient because there was no other way in which the privilege could be asserted. The alternative is that the registration requirements are invalid because they compel incrimination without allowing an opportunity for effective assertion of the privilege.

II.

The first eleven counts charge failure to file the registration form. That form requires appellant to describe itself as a Communist-action organization and serves no other function. Appellant has consistently denied this invidious characterization. The extortion of an avowal that appellant agrees with the characterization invades appellant's freedom of belief and has no legislative purpose. It therefore violates the First Amendment and due process.

III.

The Board's finding that appellant is a Communist-action organization was conclusive in the trial for failure to register. Appellant has therefore been denied a judicial trial and trial by jury on this element of the offense. Pun-

ishment without such a trial is unconstitutional. Where a requirement is constitutional only if certain facts are first found, an administrative finding of the facts cannot constitutionally conclude the accused in a prosecution for violating the requirement. It is a constitutional prerequisite to the validity of a registration order that the organization be found to have the characteristics of a Communist-front organization.

IV.

The trial court denied an adequate voir dire examination.

The court's discretion in conducting the examination is controlled by the Sixth Amendment guaranty of an impartial jury. A particularly thorough examination must be conducted if, as here, a defendant has been the object of extensive prejudicial comment.

The court rejected questions designed to ascertain if the prospective jurors entertained deep-seated antagonisms toward appellant. The ruling was clear error, since a prejudiced state of mind is a basic cause for disqualification.

The court's refusal to ask if the jurors had formed any opinion as to guilt or innocence likewise erroneously precluded determination of a conventional cause for disqualification.

The court also erred in rejecting other questions which sought inquiry into the existence of experience and connections which could reasonably be expected to influence the jurors' ability to render an impartial verdict.

The reasons given for the rejections were in every instance manifestly unsound.

V.

Count XII charges failure to file a registration statement, as distinguished from the first eleven counts, which charge failure to register. The Act, however, does not require an organization to file a registration statement if the organization does not register. This is so because section 7(d) provides that registration "shall be accompanied by a registration statement" and because the cognate annual report and record-keeping requirements apply only to organizations which have actually registered. Congress realized that it would be pointless to exact a non-cumulative penalty for failure to file a registration statement from an organization which was incurring the bankrupting cumulative penalties imposed for failure to register.

VI.

The fine of $10,000 on each count violates the Eighth Amendment's prohibition of excessive fines. The offenses charged involved no damage to private or public interests. The first eleven counts realistically relate to only one offense. No moral turpitude or venal motives are involved in any of the counts. No other federal registration statute is so severe, and this is a test case.

The imposition of the cumulative sentences violates due process. If no civil remedy is available to test the validity of an administrative order, cumulative criminal penalties may not be imposed for disobedience of the order in the period preceding an initial prosecution. The Supreme Court decision on review of the Board's order denied appellant a civil remedy to test the concededly substantial issue of the privilege against self-incrimination.

VII.

The indictment should have been dismissed because a majority of the members of the grand jury were government employees. Alternatively, appellant should have been given a hearing on its motion to inquire into the qualifications of the grand jurors.

A grand jury is not qualified if it cannot fulfill its constitutional function of standing between the prosecutor and the accused. Government employees could not exercise this function here because of the basic governmental policy that appellant must be regarded as an enemy of the nation.

VIII.

Although the indictment alleges wilfulness, the trial court instructed the jury that conviction required merely that the failure to register and file be intentional and deliberate. "Wilful" usually connotes a bad purpose and lack of a justifiable excuse. Although the Act does not refer to any mental state, this mens rea should be read into the text on conventional principles, because of the severity of punishment, and because the Act restrains speech and association.

IX.

The failure to file a registration statement is not punishable because the prescribed statement contains demands which are excessively vague and which require the reporting of information which appellant cannot obtain.

The statement requires a listing of appellant's "members." These are defined in terms of vague criteria and factors of which appellant can have no records or knowledge. Nor is it possible for appellant to know or discover what printing or duplicating equipment is in the possession

or control of its members, affiliates, and groups in which the members have an interest. Where a demand for information is partly good and partly bad, one cannot be punished for noncompliance with the part that is good.

ARGUMENT

I. The conviction must be reversed because the registration requirements of the Act and the regulations violate the privilege of appellant's officers against self-incrimination.

Communist Party v. *S.A.C.B.*, 367 U. S. 1, held that it was premature in the review proceeding to decide whether the Board's registration order violated the constitutional privilege of appellant's officers against self-incrimination. The four dissenting justices found that the issue was not premature and that the order was invalid on that ground. The majority opinion stated (at 106-107):

> "We find that the self-incrimination challenge to § 7(a) and (d), as implemented by the Attorney General's regulations and forms, is also premature at this time • • • We cannot know now that the Party's officers will ever claim the privilege • • • Within thirty days after the Board's registration order becomes final, the Party's officers may file signed registration statements in the form required by Form ISA-1.[4] Or they may file statements claiming the privilege in lieu of furnishing the required information. If a claim of privilege is made, it may or may not be honored by the Attorney General. We cannot, on the basis of supposition that privilege will be claimed and not honored, proceed now to adjudicate the constitutionality under the Fifth Amendment of the registration provisions. Whatever proceedings may be taken after and if the privilege is

[4] The form prescribed by the Attorney General which was then in effect.

> claimed will provide an adequate forum for litigation of that issue."

The majority also recognized the possibility that the scheme of the Act afforded no way by which the officers' claim of privilege could be effectively asserted. This issue too the Court left for later determination. It said (at 109-10, emphasis supplied):

> "Assuming arguendo that this proposition is correct, the most that can be drawn from it of pertinence to the present case is that, *in a prosecution of the Party for failure to register,* or in a prosecution of its officers for failure to register the Party, the Court would have to determine whether the Subversive Activities Control Act is a statute which, like the statute in Boyd [*Boyd* v. *United States,* 116 U. S. 616], unconstitutionally circumscribes the effectual exercise of the privilege. Obviously, such a determination would never have to be made if an enforcement proceeding were never brought—either because Party officials registered pursuant to § 7(a) and (d) without complaint, or because they did choose to assert the privilege in some form in which it could be recognized."

This is the prosecution of the Party for failure to register. The indictment was brought after the privilege of the officers had been claimed and denied (J.A. 70-72). The officers' claim was reasserted in the motion to dismiss the indictment, and again denied (J. A. 8, 17). Accordingly, this case provides the "forum for litigation" of the privilege issue.

In what follows we will show that compliance with the registration requirements would compel the officers to incriminate themselves. We will also show that the privilege of the officers has been claimed in the only way available to them. Accordingly, either the claim of the privilege must be recognized as a defense to the indictment, or the Act's registration requirements are unconstitutional because they compel self-incrimination without permitting an opportunity for effectual assertion of the privilege.

A. Compliance with the registration requirements would compel the officers to incriminate themselves.

On October 7, 1961, the eve of the issuance of the Supreme Court mandate, the Attorney General published revised regulations and forms. These modified the prior regulations and forms in two respects.

(1) Under the old regulations, registration was accomplished by filing a form (ISA-1) which also constituted the registration statement and supplied the information as to the registrant's officers, members, finances and printing equipment specified in section 7(d) of the Act (Appendix, *infra* p. 13a; J.A. 56, 64-69). The new regulations separate the act of registration from the filing of a registration statement. They require registration to be accomplished by the filing of a "registration form" (IS-51a), which calls only for the registrant's name and address and its declaration that it "hereby registers as a Communist-action organization." The registration statement consists of another form (IS-51), which calls for the information required by section 7(d). (Appendix, *infra*, pp. 12a-13a; J.A. 56-63.)

(2) Under the old regulations, the single form ISA-1 had to be signed by all of the registrant's officers and the members of its governing board (J.A. 65). Under the new regulations, the two forms may be signed on behalf of the organization in either of two ways. They may be signed by an officer of the registrant who subscribes his title. Or that may be signed by any person who certifies, on the registration form, that he has been authorized by the registrant to register it and, on the registration statement, that he has been authorized by the registrant to file the statement (J.A. 57-59, 63).

It seems obvious that the amendments to the regulations were adopted in the hope of avoiding compulsory self-incrimination of the officers and overcoming the defect in

the registration procedure found by the four dissenting justices in *Communist Party* v. *S.A.C.B.*, 367 U. S. 1. The new regulations and forms do not accomplish this purpose. They require the officers to incriminate themselves in two ways: (1) the registration documents cannot be executed and filed without disclosure by the officers of their identity as officers, and (2) every item of information called for by the documents incriminates the officers who supply it.

1. The registration documents cannot be executed and filed without disclosure by the officers of their identity as officers.

An admission of membership or officership in the Communist Party is incriminating. *Blau* v. *United States*, 340 U. S. 159; *Quinn* v. *United States*, 349 U. S. 155; *Scales* v. *United States*, 367 U. S. 203. The holding in *Blau* was based on the existence of the Smith Act. Since that decision, Congress has added a further criminal sanction against Communists which is built into the Act itself. Section 4(a) makes it a crime, punishable by imprisonment for ten years, to conspire "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control. Inasmuch as the Board has found that appellant operates primarily to advance the precise objective that section 4(a) makes it unlawful to promote,[5] it is obvious that an admission of membership, let alone officership, in the Communist Party is highly incriminating under that section.[6]

---

[5] See *Communist Party* v. *S.A.C.B.*, 367 U. S. 1, 55.

[6] In section 4(f), the Act's "immunity" provision, Congress recognized that the registration requirements compel self-incrimination. However, the section is obviously ineffectual to defeat an assertion of privilege, since it does not bar prosecution under the Smith Act or section 4(a) of the Act. *Scales* v. *United States*, 367 U. S. 203, 206-19. See also *Counselman* v. *Hitchcock*, 142 U. S. 547; *United States* v. *Bryan*, 339 U. S. 323.

It follows that an officer of appellant makes an incriminating admission if he executes the registration documents as an officer, stating his title. Accordingly, the first of the prescribed methods for executing the documents compels the officer to incriminate himself directly to the Attorney General.

Self-incrimination of the officers is not avoided by the alternative method of executing the registration documents. This method permits the two documents to be signed by some person other than an officer. However, the other person is required to certify, subject to the penalties of the False Statements Act (18 U. S. C. 1001), that he has been authorized by appellant to act for it.

The authority of the "other person" to act for appellant can be given only by its officers. Accordingly, the alternative method requires at least one of appellant's officers to disclose his officership to the "other person."[7] It differs from the first method only by requiring the incriminating admission to be made to a third person rather than directly to the Attorney General. But that difference does not make the privilege unavailable to appellant's officers. For the Fifth Amendment prohibits the government from compelling a person to make an incriminating admission to *anyone*. Moreover, the third person may communicate the incriminating admission to the government voluntarily or may be forced to divulge it by grand jury or other subpoena.[8] In any event, he would be

---

[7] As a matter of fact, it is hard to see how the other person could safely execute the necessary certificate unless a majority of the officers should first disclose their positions to him and satisfy him that they are a majority.

[8] The privilege would not protect the "other person" from compulsion to divulge the identity of the officer who authorized him to execute the registration documents. For having certified that he had been given such authority, he would have waived his privilege and could not avail himself of it as to the details of the authorization.

required to list the officer by name, both as an officer and as a member, in the registration statement (J.A. 60, 62) or subject himself to the penalties of section 15(b) of the Act for wilful omissions.

Furthermore, the "other person" method of executing the registration documents is not a realistic alternative. For it is manifestly impossible for the officers to enlist the services of such a person.

In the first place, any person who signs the registration form or statement incriminates himself. He thereby admits to the Attorney General that he has a connection with and knowledge of the workings of appellant. Such an admission is itself incriminating. *Blau* v. *United States, supra.* At a minimum, it may supply a lead to evidence that the signer is connected with the defendant as a member, employee, contributor or otherwise. Moreover, by acting as the agent of the defendant, executing its plan to register with the Attorney General, conferring with its officers to secure their authorization to register it, and

---

Rogers v. *United States,* 340 U. S. 367; *Brown* v. *United States,* 356 U. S. 148; *Presser* v. *United States,* 109 App. D. C. 99, 284 F. 2d 233. Moreover, identification of the officer might be compelled under the Immunity Act, 18 U. S. C. 3486. Cf. *In re Bart,* — App. D. C. —, 304 F. 2d 631. Compulsory identification of the officer who authorized execution of the registration documents could not be avoided by using a lawyer as the "other person." For the lawyer would not be acting in a professional capacity (any layman can act as the "other person"), and hence the lawyer-client privilege would be inapplicable. *Pollock* v. *United States,* 202 F. 2d 281, 286; *Olender* v. *United States,* 210 F. 2d 795; *McFee* v. *United States,* 206 F. 2d 872; *United States* v. *Vasto,* 52 F. 2d 26; VIII Wigmore, Evidence (McNaughton ed., 1961), §§ 2296, 2297. Furthermore, the lawyer-client privilege does not apply to the identity of the client. *Tomlinson* v. *United States,* 68 App. D. C. 106; 93 F. 2d 652; *Catalog Ass'n* v. *A. Eberly's Sons,* 60 App. D. C. 216, 50 F. 2d 981; *Mauch* v. *Commissioner,* 113 F. 2d 555; *Behrens* v. *Hironimus,* 170 F. 2d 627; *United States* v. *Lee,* 107 Fed. 702; *United States* v. *Pape,* 144 F. 2d 778, 782; Wigmore, *op. cit.,* sec. 2313.

filing the registration form and statement, the signer furnishes evidence of his membership and participation in appellant and knowledge of its alleged illegal purpose. Section 5 of the Communist Control Act, 50 U. S. C. 844; *Killian* v. *United States,* 368 U. S. 231. He thus incriminates himself under section 4(a) of the Act and the Smith Act and subjects himself to the onerous sanctions which the Act imposes on defendant's "members" (secs. 5 and 6, 50 U. S. C. 784, 785) and to the duty of self-registration as a "member" (sec. 8, 50 U. S. C. 787).

Second, any person who signs the registration statement risks prosecution under section 15(b) of the Act for false statements in or omissions from that document.

Obviously, no person would be so foolhardy as voluntarily to run the risks involved in executing the registration form and statement and at the same time to incur the odium of informing on appellant's officers, members and contributors. The "other person" method is therefore unworkable. Hence it would not provide the officers with an alternative to self-incrimination even if their self-incrimination were not inherent in the method itself.

2. Every item of information called for by the registration documents incriminates the officers who supply it.

Whether or not the officers sign the registration form and statement, they must furnish the information called for by these documents and authorize their filing. Each item of information required by the two documents, however, incriminates the officers.

The registration statement demands the names, aliases and addresses of all of appellant's officers and members (J.A. 60, 62). An officer who supplies his own name as an officer or member thereby incriminates himself. Yet he cannot avoid doing so. He supplies it directly if he

signs the statement as an officer. He supplies it just as effectively if he signs the "other person" certificate without revealing his officership, and claims his privilege on the face of the statement as to the identity of the occupant of the office which he holds and as to the identity of one member. He likewise supplies his identity if he authorizes some other person to execute the statement on behalf of appellant, thereby disclosing his officership to that person and making it necessary for the latter to list him in the statement as an officer and member.

An officer also incriminates himself by supplying any of the other information called for by the registration statement. For the fact is that section 4(a) of the Act, taken in the context of the Board's findings with respect to the objectives of appellant, and the Smith Act have so surrounded association with the Communist Party with criminality that any information concerning the personnel or activities of the organization incriminates its officers and members.

The registration statement requires the names of all officers and members of and contributors to appellant, the amounts and purposes of its expenditures, and the number, nature and location of its printing presses, mimeograph machines and the like (J.A. 60-63). This data would provide the Attorney General with evidence, for use against the officer who supplied it, of the existence, magnitude and activities of an alleged section 4(a) conspiracy "to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship" under foreign control. It would also provide evidence for use in a prosecution of the officer under the advocacy, organizing, literature, membership and conspiracy clauses of the Smith Act. *Dennis* v. *United States*, 341 U. S. 494; *Scales* v. *United States*, 367 U. S. 203.

Even if it could be said that some isolated item of information called for by the registration statement would

not itself constitute evidence of criminality on the part of the officer who furnished it or a link in a chain of such evidence, it could not fail to supply a lead to witnesses and other sources of evidence which might incriminate him under section 4(a) or the Smith Act. Accordingly, it cannot be said of any item of information demanded by the registration statement that it is " '*perfectly clear,* from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." *Hoffman* v. *United States,* 341 U. S. 479, 488 (emphasis in original). An answer to each demand for information contained in the registration statement is therefore within the protection of the privilege.

The contents of the registration form likewise incriminate any officer who files it or authorizes its filing. The form requires an admission that appellant is a Communist-action organization (J.A. 57).[9] By definition, such an organization is a participant in an international criminal conspiracy, under Soviet control, to overthrow the government by illegal means and to supplant it with a "Communist totalitarian dictatorship" subservient to the Soviet Union. Act, sections 3(3) and 2; *Communist Party* v. *S.A.C.B.,* 367 U. S. 1, 55. An admission by an officer that his organization is of such a nature incriminates him under section 4(a) of the Act and the Smith Act.

Not only does the information demanded by the two registration documents incriminate appellant's officers, but the documents themselves could be introduced in evidence in a prosecution of any officer who signed them or authorized their filing as admissions by him of all of the statements

---

[9] The only other information called for by the form is appellant's name and address. This information was supplied—no doubt superfluously—by appellant to the officer in charge of registration prior to the registration deadline (J.A. 70-71).

which they contain other than the statements that he is an officer and member of appellant. This is so because of the limited prohibition which section 4(f) of the Act imposes on evidentiary use of the registration documents. The section merely provides that, "The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person. * * *" Accordingly, all of the contents of the registration documents may be received in evidence against an officer except the listing of his name as an officer and member.

Thus, the Act not only requires an officer of appellant to incriminate himself to the government's chief prosecutor but also compels him to compile the incriminating information in the form of written admissions for introduction in evidence at his prosecution.

The compulsory disclosure of the incriminating information called for by the registration documents cannot be justified under *United States* v. *White*, 322 U. S. 694, which holds that an officer of an organization is not privileged to refuse production of the organization's records on the grounds that their contents incriminate him.

First, *White* applies only to the production of organization records, and not to the preparation and filing of original statements, like the registration documents, whether or not derived from the records. *White* itself pointed out that the decision was not meant to infringe the individual's privilege against "compulsory incrimination through his own testimony" (at 701). The same distinction was made in *Shapiro* v. *United States*, 335 U. S. 1, 27, and *Wilson* v. *United States*, 221 U. S. 361, 377, 385. Most recently, *Curcio* v. *United States*, 354 U. S. 118, held that an officer of an organization is privileged not to reveal the whereabouts

of incriminating organizational records.[10] *A fortiori,* he may not be compelled to give information as to their contents. *Blau* v. *United States,* 340 U. S. 159, 160 ftn. (witness privileged to refuse to describe Communist Party records and to disclose their whereabouts).

Second, *White* is inapplicable because the registration documents call for information which may not—and most of which in all likelihood does not—appear in the organization's records.[11] *The Internal Security Act of 1950* (Note), 51 Col. L. Rev. 606, 621.

United States v. *Sullivan,* 274 U. S. 259, discussed in *Communist Party* v. *S.A.C.B.,* 367 U. S. 1, 108-09, is also inapplicable. *Sullivan* holds that a person is not excused from filing an income tax return because some of the information called for is incriminating, but that he must claim his privilege on the face of the return as to the particular incriminating items. *Sullivan* assumed that some of the information called for by the tax return was not incriminating, and there is, of course, nothing incriminating in the act of filing a return. Here, on the other hand, *all* of the information called for by the registration documents is incriminating. Moreover, as we have shown, the execution and filing of the documents ipso facto compel the officers to incriminate themselves. For both reasons, the privilege is a defense in this case not only against giving specified information, but also against filing the documents. The situation here is like that in *Russell* v. *United States,* 306 F. 2d 402, which, distinguishing *Sullivan,* held that 26 U. S. C. 5841, requiring registration of firearms, violated the privilege against self-incrimination because, "Russell could make no report under section 5841 without admitting an actual or presumptive violation of law" (at 409).

---

[10] *Curcio* was decided subsequent to Judge Prettyman's opinion in *Communist Party* v. *S.A.C.B.,* 96 App. D. C. 66, 223 F. 2d 531.

[11] The Act's record-keeping requirements (sec. 7(f)) apply only to organizations registered under section 7, and appellant has not registered.

B. The privilege of appellant's officers has been asserted in the only way available to them.

Since, as we have shown, both of the registration documents compel the self-incrimination of appellant's officers, the remaining question is whether they have availed themselves of the constitutional privilege. As stated in *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 107, the privilege "is one which normally must be claimed by the individual who seeks to avail himself of its protection." Here the privilege of the officers was claimed by appellant and its officers without naming the latter. This was done in the letter of November 10, 1961, sent by appellant to the Assistant Attorney General, Internal Security Division (J.A. 71). The privilege was reasserted on behalf of the officers in the motion to dismiss the indictment (J.A. 8).

These claims of privilege must be accepted as sufficient. For there was no other way in which the officers could have availed themselves of their constitutional protection against self-incrimination.

It would have been impossible for the officers, without incriminating themselves, to have sent the Attorney General statements in their names claiming the privilege in lieu of filing the registration form and registration statement. Nor could they have claimed the privilege in their own names on the face of the registration documents. A claim of privilege in either form would have revealed the claimant to be an officer of appellant—the very admission which is incriminating.

Moreover, such a claim of privilege would not even protect the officers from prosecution under section 7(h) of the Act for failing to register and to file a registration statement on behalf of appellant. For by identifying themselves as officers in their claims of privilege, they would make the incriminating admissions, and thereafter would have no

constitutional protection against disclosure of the details called for by the registration documents. *Rogers* v. *United States, Brown* v. *United States,* and *Presser* v. *United States,* all *supra.*

The situation would be different if appellant were under no duty to register until a demand to do so was addressed to one of its officers by name. In that case, the officer could claim his privilege in opposition to the demand without making the incriminating admission that it was rightly addressed to him. But neither the Act nor the indictment predicates liability to register on such a demand, and there was no evidence that one was made. On its face and as applied, therefore, the Act provided no means by which the officers could avail themselves of the privilege other than the method employed—a claim of their privilege without naming them.

Accordingly, the question of privilege presented by this case must be resolved in one of two ways. Either the claims of privilege made without naming the officers is valid and must be honored. Or the Act is invalid because it "like the statute in *Boyd* unconstitutionally circumscribes the effectual exercise of the privilege." *Communist Party* v. *S. A. C. B.,* 367 U. S. 1, 110. Either resolution requires a reversal of the conviction.

II. Appellant cannot constitutionally be convicted for failing to file the registration form (IS-51a) requiring it to describe itself as a Communist-action organization.

The first eleven counts of the indictment are based on appellant's failure to file the registration form (IS-51a) with the Attorney General (J.A. 1-7). The form requires appellant to describe itself as a Communist-action organization by stating that it "hereby registers as a Communist-

action organization." (J.A. 57). The form calls for nothing further except appellant's name and address, information which is likewise demanded by the registration statement (J.A. 60) and which appellant furnished the Department of Justice in its letter of November 10, 1961 to the Assistant Attorney General (J.A. 71). Thus, the sole purpose of the form is to coerce an invidious self-characterization from appellant.

The Act (secs. 2 and 3(3)) defines a Communist-action organization as an organization which is under Soviet control and seeks to overthrow the government of the United States by any means necessary, including force and violence, and the establishment in this country of a "Communist totalitarian dictatorship." See *Communist Party* v. *S. A. C. B.*, 367 U. S. 1, 55. The Board found appellant to be "a Communist-action organization under the provisions of the Subversive Activities Control Act," and the Supreme Court affirmed (J.A. 51-52). It is a matter of judicial notice, however, that throughout eleven years of litigation before the Board and in the courts, appellant stoutly and consistently maintained that it is *not* such an organization. It reiterated this position in its letter of November 10, 1961, to the Assistant Attorney General (J.A. 71). And in the press conference that followed the Supreme Court decision, Gus Hall denounced the accusation that appellant advocates violent overthrow, sabotage or subversion as "the big lie" (J.A. 35-36).

Thus, appellant stands convicted on eleven counts of the indictment for refusing on as many successive days to profess, contrary to its belief, that it is a Soviet-controlled seditious conspirator as the Board found it to be. The extortion of such a declaration obviously invades appellant's freedom of belief by making it certify as true what it believes to be a lie. No conceivable governmental interest is served by forcing appellant to acknowledge that the

Board's finding is accurate. This lack of purpose is emphasized by the fact that the avowal was not required by the Attorney General's original regulations and forms, which were in effect for ten years (*supra*, p. 14). There is, therefore, nothing to balance against the invasion of appellant's freedom of belief and conscience. Accordingly, conviction on the first eleven counts of the indictment palpably violates the First Amendment and due process.

In *W. Va. Board of Ed.* v. *Barnette*, 319 U. S. 624, persuasive considerations of public interest were advanced in support of a statute requiring a salute to the flag. Yet the Court invalidated the statute, stating (at 634), "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Still less may such compulsion be exerted here, where the utterance serves no possible legislative purpose.

"Of course we agree that one may not be imprisoned or executed because he holds particular beliefs." *American Communications Association* v. *Douds*, 339 U. S. 382, 408. It follows that one may not be punished for refusing to forswear his beliefs. Yet that is the precise effect of appellant's conviction under the first eleven counts of the indictment.

The invalidity of the registration form is further established by a series of cases under the National Labor Relations Act. It had been the practice of the National Labor Relations Board to require employers found to have engaged in unfair labor practices to post notices that they would "cease and desist" from such practices. The cases decide that while an employer may be required to state that he will not engage in unfair labor practices in the future, he may not be compelled to make the confession of past misbehavior implied in the statement that he will cease and

desist from such practices. Accordingly, the cases hold that Congress had not authorized the Labor Board to exact this confession. *Art Metals Construction Co.* v. *N.L.R.B.*, 110 F. 2d 148; *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F. 2d 291; *Kansas City P. & L. Co.* v. *N.L.R.B.*, 111 F. 2d 340; *Swift & Co.* v. *N.L.R.B*, 106 F. 2d 87; *N.L.R.B.* v. *Louisville Refining Co.*, 102 F. 2d 678.

In *Art Metals Construction Co.* v. *N.L.R.B.*, Judge Learned Hand stated (at 151):

> "But we think that to compel [the employer] to say that he will 'cease and desist', necessarily imports that in the past he has been doing the things forbidden; indeed we find it hard to see how the contrary can be rationally argued. Forcibly to compel anyone to declare that the utterances of any official, whoever he may be, are true, when he protests that he does not believe them, has implications which we should hesitate to believe Congress could ever have intended * * * too long a history and too dearly bought privileges are behind such refusals. Moreover, we do not see what the words add to the effect of the notice, which must in any event be of complete compliance with the order. We cannot suppose that the Board has any interest in the precise rubric adopted; but we can very well understand the sense of outrage which anyone may feel at being forced publicly to declare that he has committed even a minor dereliction of which in his heart he does not believe himself guilty."

Similarly, in the *Hartsell Mills* case, Judge Parker stated (at 293):

> "We cannot imagine a court sending a convicted employer to jail for not publishing a confession that he has been guilty of violating the law, for not even a convicted felon can be required to confess his guilt."

Like the National Labor Relations Act, section 7(a) of the Act should be construed so as not to require persons

to declare their concurrence in official declarations which they do not believe. Indeed, this was the construction reflected in the Attorney General's original regulations. If section 7(a) is susceptible of this construction, the first eleven counts of the indictment must be dismissed because the registration form prescribed by the Attorney General after the Supreme Court decision is not authorized by the Act. If, on the other hand, the prescribed form is held to be required by section 7(a), these counts must be dismissed because the section is unconstitutional.

III. Sections 7 and 15 of the Act unconstitutionally denied appellant a judicial trial on the issue of whether it is a Communist-action organization.

Sections 7 and 15 of the Act, under which appellant was convicted, make it criminal for an organization which has been found by the Board to be a Communist-action organization to fail to comply with the Act's registration requirements. Under these sections, no finding that the organization is a Communist-action organization is ever made in a trial before a court and petit jury. Instead, the Board's determination that an accused organization is a Communist-action organization is conclusive and not open to relitigation in criminal proceedings charging failure to register or to file a registration statement.

In accordance with the statutory scheme, the indictment alleges that appellant was found by the Board to be a Communist-action organization, not that it is or was such an organization (J.A. 2). And the trial court instructed the jury that the Board's determination "is binding on you and me" and "we start from the proposition that this defendant is a Communist-action organization and, therefore, in duty bound to register under the Act and to file the registration statement" (J.A. 44).

Thus appellant has been subjected to criminal punishment for failing to perform the registration obligations of

a Communist-action organization without trial by judge and jury of the issue of whether it is a Communist-action organization. Because of this fact, the conviction and its statutory authorization violate the following provisions of the Constitution: Article III, sec. 2, cl. 3, and the Sixth Amendment, both requiring the trial of crimes by jury; due process of law; Article III, sec. 1, vesting the judicial power of the United States in the courts; and Article 1, sec. 9, cl. 3, prohibiting bills of attainder. *Kennedy* v. *Mindoza-Martinez*, — U. S. —, decided February 18, 1963; *Wong Wing* v. *United States*, 163 U. S. 228.

In *Wong Wing*, a United States Commissioner, acting pursuant to statute, sentenced a Chinese alien to imprisonment on a finding of the Commissioner that the alien was illegally present in the United States. The Court held that the statute violated the Fifth and Sixth Amendments because it authorized infamous criminal punishment without indictment by grand jury and trial by court and petit jury. The Court recognized that aliens could be expelled from the country on administrative determinations of illegal presence, but it held that they could not be punished for the same cause without observance of the constitutional procedures governing criminal cases.

This case differs from *Wong Wing* in that appellant has had a judicial trial of one element of the offense—failure to file the registration documents. But the principle of *Wong Wing* requires a judicial trial of *every* element of an offense before criminal punishment can be imposed. This appellant has not had, there never having been a judicial trial of whether appellant is a Communist-action organization and therefore required to file the documents. The result in *Wong Wing* would have been the same if the alien had first been administratively determined to have unlawfully entered the country, and had then received a judicial trial limited to the issue of whether he was in the country.

Virtually this situation was presented in *United States* v. *Spector*, 343 U. S. 169. There a statute prescribed criminal punshment for aliens who, after having been administratively ordered deported from the United States, failed to leave the country or to apply for the travel documents necessary for their departure. The majority of the Court did not reach the question of whether the statute unconstitutionally excluded the issue of deportability from the criminal trial. [12] However, Justice Jackson, joined by Justice Frankfurter, dissented, holding that the question should have been reached and that the statute was unconstitutional on that ground. Justice Jackson stated (footnotes omitted):

> "I think this Act to punish an alien's unlawful presence in the United States is unconstitutional for reasons apparent on its face. It differs in subtlety but not in substance from one held unconstitutional more than half a century ago in a decision repeatedly and recently cited with approval. *Wong Wing* v. *United States*, 163 U. S. 228." (At 174-175.)
>
> • • •
>
> "This Act creates a crime also based on unlawful residence in the United States. The crime consists of two elements: one, an outstanding order for deportation of an alien; the other, the alien's willful failure to leave the country or take specified steps toward departure. The Act does not permit the court which tries him for this crime to pass on the illegality of his presence. Production of an outstanding administrative order for his deportation becomes conclusive evidence of his unlawful presence and a consequent duty to take himself out of the country, and no inquiry into the correctness or validity of the order is permitted.
>
> "The subtlety of the present Act consists of severing the issue of unlawful presence for administrative determination which then becomes conclusive upon

[12] Spector had not raised, briefed or argued the question.

> the criminal trial court. We must not forget that, while the alien is not constitutionally protected against deportation by administrative process, he stands on an equal constitutional footing with the citizen when he is charged with crime. If Congress can subdivide a charge against an alien and avoid jury trial by submitting the vital and controversial part of it to administrative decision, it can do so in the prosecution of a citizen. And if vital elements of a crime can be established in the manner here attempted, the way would be open to effective subversion of what we have thought to be one of the most effective constitutional safeguards of all men's freedom." (At 177-78.)
>
> • • •
>
> "The adjudication that an alien has been guilty of conduct subjecting him to deportation is not made by procedures constitutional for judgment of crime. It is not made either by a jury trial or a court decision. • • • The finding that the alien is guilty of conduct subjecting him to deportation does not require proof beyond reasonable doubt but may be made on mere preponderance of evidence. • • •
>
> "Having thus dispensed with important constitutional safeguards in obtaining an administrative adjudication that the alien is guilty of conduct making him deportable on the ground it is only a civil proceeding, the Government seeks to turn around and use the result as a conclusive determination of that fact in a criminal proceeding. We think it cannot make that use of such an order." (At 178-79.)

Like the self-deportation statute condemned by Justices Jackson and Frankfurter, the Act subdivides the charge against appellant and avoids a judicial and jury trial by submitting to conclusive administrative decision the "vital and controversial part" of the matter—namely, whether appellant is a Communist-action organization. For the reasons stated in Justice Jackson's opinion and in line with *Wong Wing*, appellant has thus been deprived of constitutional safeguards.

A statute may, of course, impose criminal penalties for violations of administrative rules and regulations. And it may require that challenges to the validity of the administrative regulations be made in a proceeding other than the criminal trial. *Yakus* v. *United States,* 321 U. S. 414. But these principles apply only to administrative rule-making, not to administrative adjudications as to the conduct or guilt of specific persons. Justice Jackson pointed out this key distinction in *Spector* at 179.

Our contention is not contradicted by *Cox* v. *United States,* 332 U. S. 442, on which the government relied below. *Cox* held that in prosecutions for violation of the military draft act the accused is not entitled to a *de novo* jury determination of the correctness of the draft board's denial of an exempt classification. A draft exemption, however, is a grant of an exceptional privilege excusing the individual from an obligation which is generally applicable to all in his age group. Cf. *United States* v. *Nugent,* 346 U. S. 1. It is not the equivalent of an administrative determination that an organization or individual has engaged in misconduct which subjects it or him to exceptional liability.

Another reason for the inapplicability of *Cox* is that draft exemptions are not constitutionally required and hence can be withheld on the government's own terms.[13] One of those terms can be that the administrative decision denying exemption shall be conclusive in a prosecution for escaping the draft.

But the law is different where a requirement can be constitutionally imposed only if certain facts are first found. In that event an administrative finding of those facts cannot conclude the accused in a prosecution for violating the requirement. This was the situation in *United States* v.

---

[13] Provided they do not make arbitrary discriminations, such as exempting clergymen of one denomination and not of others.

Spector, supra, since Spector could not constitutionally have been ordered deported without a finding that he was an alien and that his presence in the country was illegal or undesirable. Because this difference is obvious, Justices Jackson and Frankfurter, who voted with the majority in *Cox,* saw no reason to distinguish *Cox* in their *Spector* opinion.

The case here is like *Spector* and unlike *Cox.* For it is a constitutional prerequisite to the validity of a registration order that the organization be found to have the characteristics of a Communist-action organization. The Supreme Court upheld the validity of the Board's order against appellant on the ground that, under the statutory definition, a Communist-action organization is a dangerous Soviet agent. Simultaneously, it reaffirmed its holdings [14] that compulsory disclosure requirements may not be imposed to impair the functioning of non-dangerous organizations. *Communist Party* v. *S. A. C. B.,* 367 U. S. 1, 88-92.

Accordingly, the Act is unconstitutional because it made the Board's determination that appellant is a Communist-action organization conclusive in the present criminal proceeding, thereby denying appellant a judicial trial by jury on that issue.

IV. The conviction must be reversed because of the trial court's denial of an adequate voir dire examination.

The voir dire examination of prospective jurors implements the Sixth Amendment's guarantee of the right "to enjoy" trial "by an impartial jury." *Dennis* v. *United States,* 339 U. S. 162, 171-72; *Morford* v. *United States,* 339 U. S. 258.

---

[14] *N.A.A.C.P.* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Shelton* v. *Tucker,* 364 U. S. 479.

The trial judge's discretion in deciding what questions to ask the jury panel is controlled by this function of the voir dire. "In exercising its discretion, the trial court must be zealous to protect the rights of an accused." *Dennis* v. *United States, supra,* at 168. "[T]he judge is bound either to make or to permit such inquiries to be made as will entitle him in the exercise of his discretion to exclude from the jury persons who have formed fixed opinions about the case and are not fair and impatrial jurors within the contemplation of the law." *Neal* v. *United States,* 22 F. 2d 52, 53. The court's discretion in rejecting requested questions is "subject to the essential demands of fairness." *Aldridge* v. *United States,* 283 U. S. 308, 310; *Sellers* v. *United States,* 106 App. D. C. 209, 210, 271 F. 2d 475, 476.

Moreover, in the federal system at least, a reasonable latitude of inquiry must be permitted to enable counsel to utilize their peremptory challenges intelligently. *Bailey* v. *United States,* 53 F. 2d 982, 984; *Kurczak* v. *United States,* 14 F. 2d 109, 110; *Beatty* v. *United States,* 27 F. 2d 323, 324; *Lurding* v. *United States,* 179 F. 2d 419, 421; *Smith* v. *United States,* 262 F. 2d 50, 51.

The trial court is obliged to conduct a particularly searching and thorough voir dire if the defendant or the case has been the object of extensive prejudicial comment in the community. *United States* v. *Milanovich,* 303 F. 2d 626, 629; *United States* v. *Hoffa,* 156 F. Supp. 495, 499-500; *United States* v. *Kahaner,* 204 F. Supp. 921, 924. This, of course, was the situation here. For at least the past fifteen years, appellant has been subjected in all the mass media of communication to constant and unremitting vilification, much of it stemming from governmental sources.

The trial court erred in refusing to ask the panel certain questions submitted by appellant's counsel, none of which was comprehended in those asked by the court.[15] These questions may be conveniently grouped in three categories.

A. Questions as to the existence of animus against appellant.

The court rejected the first five questions requested by appellant, as follows (J.A. 21, 25):

> "1. Do any of you hold any feeling of ill-will or hostility toward the Communist Party of the United States?
>
> "2. Have any of you ever said or written anything derogatory about or hostile to the Communist Party?
>
> "3. Do any of you believe that the Communist Party is an enemy of this country?
>
> "4. Do any of you believe that the Communist Party is a subversive organization?
>
> "5. Do any of you believe that the Communist Party is a threat to the safety or well-being of yourself or your family?"

These questions were obviously designed to ascertain whether the prospective jurors entertained deep-seated antagonisms toward appellant. Their rejection was manifest error.

---

[15] The voir dire examination was brief. At the outset, the court of its own volition asked several standard questions—whether the members of the panel had heard or knew about the case, were acquainted with counsel or the announced witnesses, and knew of any reason why they could not decide the issues fairly and impartially and solely on the evidence (J.A. 19-21). The court asked three questions submitted by the prosecution (J.A. 27-28). Of the questions submitted by the defense (J.A. 21-25), the court asked ten in full (Nos. 9, 10, 12, 13, 14, 15, 16, 21, 22, 29) and two in part (Nos. 17, 19) (J.A. 28-31).

"It is admitted," said Chief Justice Marshall, "that where there are strong personal prejudices the person entertaining them is incapacitated as a juror." *United States* v. *Burr,* Fed. Cas. No. 14,692g., p. 50. Protection from a juror's animus is precisely what the Sixth Amendment guarantees. As the Supreme Court has repeatedly observed, "Impartiality is not a technical conception. It is a state of mind." *United States* v. *Wood,* 299 U. S. 123, 145; *Dennis* v. *United States,* 339 U. S. 162, 172; *Irvin* v. *Dowd,* 366 U. S. 717, 724.

Since a prejudiced state of mind is cause for disqualification, it follows that the trial court must allow the prospective jurors to be asked if they entertain prejudices against the defendant.[16] "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis* v. *United States,* 339 U. S. 162, 171-72; *Morford* v. *United States,* 339 U. S. 258. Questions about "a disqualifying state of mind" arising from "prejudices of a serious character" must be permitted, particularly when, as here, there is good reason to suspect its prevalence. *Aldridge* v. *United States,* 283 U. S. 308, 313.

Aldridge reversed because of a refusal to permit voir dire exploration for racial bias in the trial of a Negro accused of murdering a white man. *Frasier* v. *United States,* 267 F. 2d 62, 66 (1st Cir.) reversed for refusal to allow similar inquiries even though there was no white victim of the crime, the Negro defendant being charged with making false statements to the government. Yet hostility toward the group to which a defendant belongs is a step removed from hostility toward the individual defendant, the subject to which the questions here involved were addressed.

---

[16] Such questioning is also required in order to enable counsel to exercise their preemptory challenges intelligently. *Supra,* p. 34.

Because of the trial court's rulings, the box may have been filled, for all any one knows, by jurors having an almost pathological hatred and fear of the Communist Party. That such persons exist in significant numbers is common knowledge. To consider them impartial jurors in a trial of appellant would be a mockery of the Sixth Amendment.

In disallowing the first question—whether the prospective jurors harbored ill-will or hostility toward appellant—the court explained to counsel (J.A. 25):

> "You must realize this, gentlemen, that every person in the United States, or most people in the United States who are not either members of the Communist Party or sympathizers with it are opposed to it. It is like in a murder case, everybody is opposed to murder, but that does not disqualify people opposed to murder from sitting as jurors."

We think this must be the first time in history that a court has refused to inquire for bias on the stated ground that the inquiry would be sure to uncover it. Other courts have supposed that a likelihood of animus increased their responsibility to conduct a through voir dire. *Supra,* p. 34. And contrary to what seems to have been the court's assumption, the acceptability of jurors who are hostile to crime stems not from the universality of the sentiment, but from the fact that antipathy to crime is not the same as prejudice against the one accused of crime. It was the latter subject to which the questions here were addressed.

Where there is much bitterness, the trial judge does, of course, have a problem in selecting a jury. But the solution is not to jettison the Sixth Amendment so as to make things easy, but to conduct a careful and patient voir dire, knowing that there are always some people who keep their heads even amid widespread hysteria. That is what Chief Judge Marshall did in picking a jury to try

Aaron Burr, about whom everybody seemed to have only the strongest of emotions. See *United States* v. *Barber*, 21 D. C. 456, 463. It was not right for the trial judge to assume without even trying that an unprejudiced jury could not be selected from the populous District of Columbia.

B. Questions as to opinion concerning appellant's guilt or innocence.

The trial court refused to ask the jury panel the following question submitted by appellant (J.A. 21, 25):

> "6. Have any of you formed any opinion as to the guilt or innocence of the defendant in this case, the Communist Party?"

The ruling was clearly erroneous because it precluded determination of a conventional cause for disqualification. It is elementary that a preconceived firm opinion on guilt or innocence, as distinguished from a "light impression", disqualifies the holder of the opinion from serving as a juror. *Reynolds* v. *United States*, 8 Otto (98 U. S.) 145, 155; *United States* v. *Burr*, Fed. Cas. No. 14,692g; *United States* v. *Barber*, 21 D. C. 456; *Juelich* v. *United States*, 214 F. 2d 950, 955.

It follows that the trial court must permit inquiry on voir dire to determine whether any of the prospective jurors entertain such a disqualifying opinion. *Neal* v. *United States*, 22 F. 2d 52, 53. The standard method of initiating this inquiry is by asking a question along the lines of that submitted by appellant. "The almost universal test proposed to ascertain whether the juror entertains a bias or prejudice against a prisoner is to inquire whether he has formed or expressed an opinion as to his guilt or innocence." *United States* v. *Barber*, 21 D. C. 456, 462. If the answer is in the affirmative, follow-up questions are necessary. *Ibid.*; see also Rule 24(a), F. R. Cr. P.; 2 Am. Jur. Proof of Facts 508.

In denying appellant the benefit of this "almost universal test", the trial judge gave as his reason that he had already covered the subject (J.A. 25). This was, however, not the case.

The judge must have been referring to one or both of two questions he had asked on his own initiative at the opening of the voir dire. The first of these (J.A. 19) was, "Are there any of you ladies and gentlemen who have heard or know about this case?" Only two members of the panel responded, and they never entered the jury box (J.A. 19-20). It does not follow, however, that the other prospective jurors were without preconceived opinions as to appellant's guilt or innocence. If they had not heard about "this case" before they entered the courtroom, they had just heard the name of the defendant and a synopsis of the charges, and they might previously have heard of the facts which gave rise to the case. Also, it would not be surprising if some of them had a fixed opinion that the Communist Party must be guilty of any offense of which it was formally accused by the government. Indeed, there are many people who feel that way about every one whom a grand jury indicts.

The second question asked by the judge at the opening (J.A. 21) was: "Does any one of you know of any reason why you cannot fairly and impartially decide the issues of this case solely on the evidence to be introduced at this trial if you were selected to serve on this jury?" This general question obviously is not and cannot be a substitute for any specific inquiry, including whether any prospective juror has formed an opinion on the merits. Otherwise, the determination of a juror's impartiality would be made by the juror himself, and no further voir dire would ever be required if this single, ritualistic query were received in silence. Yet it is a familiar psychological phenomenon that men are most confident of their impartiality concerning those issues on which they are most

opinionated. Accordingly, *Morford* v. *United States,* 339 U. S. 258, reversed a conviction because of an inadequate voir dire stemming from a refusal to ask specific questions, even though the trial court had asked the panel, at the request of the defense, "Does any reason suggest itself to any one of you why you should not sit as jurors in this case and render a fair and impartial verdict solely on the evidence and under the instructions as to the law given by the Court?" Joint Appendix, pp. 59 (requested question 22) and 63-65 (rulings on requests), *Morford* v. *United States,* 85 App. D. C. 172, 176 F. 2d 54, 770 Records & Briefs, No. 9854. See also *Smith* v. *United States,* 262 F. 2d 50, 51 (reversing for inadequate voir dire even though trial court asked "whether any juror was sensible to any bias or prejudice which would, in any way, prevent [him] from giving * * * a fair and impartial trial").

C. Questions as to other matters affecting the ability to be impartial.

The remaining questions rejected by the trial judge inquired into the existence of experiences and connections would could reasonably be expected to influence the jurors' ability to render an impartial verdict. Affirmative answers to some of these questions would ipso facto have constituted cause for disqualification. Affirmative answers to others would have raised such a possibility of partiality as to require brief further inquiry into the ability of the panel member to resist the influence. All the questions were highly relevant to an intelligent use of the peremptory challenges. All related to sources of prejudice which could very possibly exist and which therefore were of practical concern. By rejecting these questions, the trial court abused its discretion because it foreclosed reasonable inquiry into "possible influence" on the jurors' "ability to render a just and impartial verdict." *Morford* v. *United States,* 339 U. S. 258, 259.

The trial court refused to ask whether any member of the panel had "ever been the subject of a government loyalty or security investigation" (question 11, J.A. 22, 26).

This question was relevant because of the well-known circumstances that investigated persons frequently develop a sense of insecurity, causing over-compensating reactions in situations with political implications. Such an individual might well find it almost impossible to render a verdct in favor of the Communist Party.

Morford v. *United States, supra,* held that the trial court was required to permit interrogation of government employee jurors with reference to the possible influence of the government loyalty program. At least as real a possibility of bias exists with respect to persons who have experienced loyalty or security investigations. And considering the pervasive extent of loyalty and security investigations in both private and public employment, there was a real possibility that the panel included such persons.[17]

The trial court first rejected the question (J.A. 26) on the ground that "a lot of people might have been the subject of a government loyalty or security investigation without knowing it." When defense counsel proposed overcoming this obstacle by inserting the words "to your knowledge," the court stated (*ibid.*):

> "And also I do not want to embarrass prospective jurors by having them stand up and say I have been

---

[17] In a book published in 1958, Prof. Ralph S. Brown, Jr. of Yale Law School estimated that at least one person out of five in private employment "as a condition of his current employment, had taken a test oath, or completed a loyalty statement, or achieved official security clearance, or survived some undefined private scrutiny." Loyalty and Security, Employment Tests in the United States (Yale Univ. Press) 181.

> investigated as to my loyalty. I do not see any reason for that. I could understand it better if the Government asked for the question."

The judge's solicitude to avoid embarrassing the prospective jurors seems inconsistent with his asking, at the government's request (J.A. 27-28), whether any of them had ever been a member of the Communist Party and, at appellant's request (J.A. 30), whether any had been a member of the Ku Klux Klan, Nazi Party of America, or John Birch Society. In any event, it is hard to imagine a clearer abuse of discretion than this subordination of the Sixth Amendment to a concern for jurors' susceptibilities.

(2) The trial court also refused to ask questions designed to ascertain if any members of the panel were informers on appellant and its members (J.A. 22-23, 26).[18] It needs no demonstration that it is neither seemly nor fair to have the Communist Party tried by such persons. Cf. *Communist Party* v. *S.A.C.B.*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1.

The trial judge did not gainsay the relevancy of these questions; on the contrary, by asking whether any prospective juror had ever testified before any committee investigating Communism (question 17, J.A. 22-23, 26), he showed his awareness of the potentially harmful situation. The reason he gave for ruling that he would not inquire about

---

[18] "17. Have any of you ever * * * given information to * * * the House Committee on Un-American Activities, the Senate Internal Security Sub-Committee, or any other committee or agency engaged in investigating Communism?" "18. Have any of you ever supplied information regarding the Communist Party or Communists to the Federal Bureau of Investigation, any other police or law enforcement agency, or any legislative committee?" The court also rejected that part of Question 19 which asked whether any were related to or acquainted with any one who had given information about the Communist Party or Communism to the FBI or other investigative agencies.

undercover informers was that "the law is that an informant has a right to remain secret" (J.A. 26). We know of no such law, and if there were one, it would have to yield to the Sixth Amendment.

(3) The trial court refused to ask the prospective jurors whether they had read any books or articles on Communists or Communism by named, well-known anti-Communist writers and whether they regularly listened to named, well-known anti-Communist radio programs (J.A. 23-24, 27).[19]

The judge did not question that the named writers and programs were violently anti-Communist. All he said was, "I am not going to ascertain the extent of reading of any particular juror," and "I am not going to ask jurors who their favorite columnists [commentators?] are" (J.A. 27).

It is thoroughly established, however, that where there has been harmful publicity regarding a defendant or the case, it is the duty of the trial judge to ascertain whether the potential jurors have been exposed to the publicity and if so, whether they can surmount its effects. *Medley* v. *United States,* 81 App. D. C. 85, 87, 155 F. 2d 857, 859; cases cited *supra,* p. 34; cf. *Irvin* v. *Dowd,* 336 U. S. 717; *Marshall* v. *United States,* 360 U. S. 310.

This principle was abandoned by the trial court for no better reason than a squeamishness about inquiring into jurors' reading and listening habits.

Oddly enough, no such sensibility prevented the trial judge from inquiring whether the prospective jurors subscribed to various periodicals. The reason for the incon-

---

[19] "20. Have any of you ever read any books or articles on the subject of Communists or Communism by: J. Edgar Hoover, Elizabeth Bentley, Whitaker Chambers, Herbert Philbrick, Louis Budenz, J. B. Mathews, Ralph De Toledano, William Buckley, Gerald L. K. Smith?" "24. Do any of you regularly listen to any of the following radio programs: Fulton Lewis, Jr., Life Line, John T. Flynn's American Future, Clarence Manion's Forum?"

sistency is illuminating. The court first granted without comment a request by the government to inquire into subscriptions to left-wing periodicals (J.A. 28). When the judge then came to appellant's request concerning subscriptions to right-wing periodicals, he observed that the question "is proper in view of No. 4 of the Government's questions" (J.A. 27). It does not seem to be a correct exercise of discretion to make the acceptability of defense questions on voir dire depend on what the government has happened to ask.

(4) The trial judge granted the government's request for inquiry into whether potential jurors were members of certain named organizations (J.A. 27). He then granted appellant's request (question 22) for inquiry into membership in other named organizations, on the grounds that it was proper in view of the government's request (J.A. 24, 27). But because the number of anti-Communist organizations are legion,[20] the defense also requested the following question (J.A. 24):

> "23. Aside from the organizations just named, have any of you ever been or are you now a member of or contributor to any organization or group which has as one of its major policies a policy of antagonism or hostility toward the Communist Party?"

This inquiry into an indicium of bias was clearly required. Cf. *Smith* v. *United States,* 262 F. 2d 50 (reversible error in trial of Negro to refuse to inquire into membership in racist organizations); *People* v. *Reyes,* 5 Cal. 347, 349 (reversible error in trial of Mexicans to refuse to inquire into membership in Know Nothing Party), cited approvingly in *Aldridge* v. *United States,* 283 U. S. 308, 313.

---

[20] See pamphlet, Ellsworth and Harris, The American Right Wing, A Report to the Fund for the Republic (Pub. Aff. Press, Wash., D. C.) *passim.*

The trial court rejected the question on the grounds that it was "too vague" (J.A. 27). Manifestly the question did not suffer from any such defect. In the *Smith* case, *supra,* the Fourth Circuit reversed for a trial court's refusal to ask, among other things, whether any prospective juror was "a member of any organizations dedicated toward racial hate, such as the Ku Klux Klan, White Citizen's Council, or similar organizations." Having "a policy of antagonism or hostility toward the Communist Party" is at least as definite as "dedicated toward racial hate."

Moreover, if the trial court thought appellant's question was vague, it should have made whatever changes were necessary instead of denying the request entirely. "If the questions were not properly framed, the Court could have amended them so as to elicit the desired information as to membership in these organizations." *Smith* v. *United States, supra,* at 51.

(5) The trial court refused to ask (J.A. 31) whether any member of the panel had "ever served on a grand jury which investigated Communist activity" (question 28, J.A. 25).

The court recognized the relevance of this question by first granting the request and then refusing it on the ground that asking it "would require a disclosure of secret Grand Jury proceedings" (J.A. 31). If the question sought such a disclosure, it was within the discretion of the court to permit it. Rule 6(e), Fed. Rules Cr. Pr. Since the disclosure would have been minimal and would have contributed toward securing an impartial jury, the court abused its discretion in declining the question. A question as to whether a juror was a member of a grand jury investigating a more specific subject was allowed in *Taylor* v. *Merrill,* 104 F. 2d 710, and that was civil case.

(6) The trial court refused to ask the following question (J.A. 24, 27):

> "25. Would any of you be embarrassed in any way or encounter any difficulties or problems in your employment, occupation, social or political relationships if you should vote to acquit the defendant, the Communist Party, and the fact that you so voted became publicly known?"

The question was singularly appropriate in the existing political climate. Cf. *Morford* v. *United States, supra.* We think the following colloquy relating to this ruling amply demonstrated the court's abuse of discretion (J.A. 27):

> "[The Court]: I am not going to ask No. 25 because if I did that I would have to ask the converse, whether they would be embarrassed by finding a verdict of guilty.
>
> "Mr. Forer [of counsel for defendant]: We would have no objection to your asking the converse, Your Honor.
>
> "The Court: I think I better not ask either."

(7) The trial court also refused to ask (J.A. 25, 27) whether any prospective juror "would have any difficulty or problem in giving to the Communist Party the benefit of the rule of law that a defendant is presumed innocent unless proved guilty beyond a reasonable doubt" (question 26). The question should have been asked on the same principles as the preceding one. And again the court's stated reason reveals an abuse of discretion. The court said (J.A. 27):

> "I always decline to ask such a question as No. 26. I instruct the jury as to the degree of proof that is requisite and I assume that my instructions will be followed."

On this theory the entire voir dire should be replaced by an instruction that the jury be impartial.

Our examination of the voir dire shows that the trial judge committed numerous errors and invariably gave unsound reasons for his rulings. The cumulative effect of the rulings was to make it impossible for the trial court to exercise its obligation "to exclude from the jury persons who have formed fixed opinions about the case and are not fair and impartial jurors within the contemplation of the law." *Neal* v. *United States, supra,* at 53. On this record, in a case where there was a high potentiality of bias, no one can tell whether the jury was impartial.

V. The conviction on count XII was erroneous because appellant, not having registered under the Act, was not required to file a registration statement.

Section 7(a) of the Act requires an organization finally ordered to register as a Communist-action organization to register with the Attorney-General on a form prescribed by him. Section 7(d) provides that such registration "shall be *accompanied* by a registration statement" containing specified information. Section 7(e) makes it the duty of "each organization *registered* under this section" to file annual reports containing the information specified in section 7(d) for the current period. Section 7(f) makes it the duty of "each Communist-action organization *registered* under this section" to keep financial and membership records.

It thus appears that the scheme of section 7 is to impose a primary obligation on an organization which has been ordered to register—i.e., the obligation of registering in compliance with the order by filing a registration form. Upon registering, an organization becomes subject to the remaining obligations imposed by section 7. But those obligations are dependent upon the act of registering and are inapplicable to an organization which does not register.

This interpretation of section 7 is beyond dispute with respect to the annual report and record-keeping require-

ments, since these are in terms imposed only on an organization which is "registered under this section." The registration statement requirement is likewise applicable only to an organization that registers.

This is apparent in the first place from the provision of section 7(d) that the registration statement shall accompany the act of registering. Obviously a registration statement cannot "accompany" a registration form if no registration form is filed.

Second, the requirement of filing a registration statement is in *pari materia* with that of filing annual reports. It would make little sense to require information in a registration statement, which soon becomes obsolete, without the further provision for keeping the information current through annual reports. Hence the fact that the latter obligation is applicable only to registered organizations is a further indication that the obligation to file a registration statement is similarly limited.

This view is further borne out by the fact that section 15 accumulates daily penalties for failure to register, but not for failure to file a registration statement, to file annual reports, or to keep records. In this respect also the Act classifies the registration statement with annual reports and record-keeping and not with the obligation to register.

This construction of the obligation to file a registration statement does not mean that Congress has rewarded organizations for recalcitrance in refusing to register when ordered to do so. Instead, it reflects the same common sense view which Congress applied to the annual reports and record-keeping requirements that there is no point in imposing additional non-cumulative penalties on an organization which is incurring bankrupting cumulative penalties for failure to register.

Finally, our construction, being at least as plausible as the contrary, is required under the principle of strict construction of a penal statute.

Accordingly, the duty to file a registration statement under section 7(d) is conditioned on registering under section 7(a). Since as the indictment alleges and the evidence establishes (J.A. 2, 73) appellant did not register under 7(a), the conviction on count XII must be reversed.

VI. The sentence is unconstitutional.

The District Court imposed the maximum statutory penalty of $10,000 fine on each count, for a total of $120,000 (J.A. 76). This sentence violates the prohibition of the Eighth Amendment against the imposition of "excessive fines."

There is a dearth of authority on this clause of the Amendment, and no judicial exposition of the factors which make a fine "excessive." These seem, however, to be readily supplied by conscience, common sense, and the decisions on the cognate prohibition of "cruel and unusual punishment." [21]

One relevant factor is the innocuousness of the offenses. Appellant's failure to file the Attorney General's forms did not, of course, injure or exploit any private person or property. The first eleven courts (J.A. 1-7) obviously

---

[21] The Eighth Amendment was taken in haec verba from the English Bill of Rights of 1688. See *In re Kemmler,* 136 U. S. 436, 446; *Weems* v. *United States,* 217 U. S. 349, 389. Since *Weems,* it has been settled that punishment is "cruel and unusual" if grossly disproportionate to the offense, even if it is not barbarous. See *Kasper* v. *Brittain,* 245 F. 2d 92, 96; cf. *Robinson* v. *California,* 370 U. S. 660. *Weems* took into account, in addition to the nature of the punishment, the injuriousness of the offense, the degree of moral turpitude, and the relative severity of punishment for other crimes (see at 363, 365, 380, 381).

involved no damage to any public interest. The only information required by the form which is the subject of those counts was appellant's name and address (J.A. 57). This information appellant supplied to the official in charge of registration prior to the deadline for registering (J.A. 71). The information required by the form (J.A. 58) which is the subject of the twelfth count (J.A. 7) was not sought for governmental regulation, but only for the purpose of exposure.

Secondly, the first eleven counts cover what is realistically only one offense, resistance to registering. To make each day of non-registering a separate offense does not get around the ban on excessive fines. In a dissenting opinion, later endorsed in *Weems* v. *United States*, 217 U. S. 349, 371, Justice Field said (*O'Neil* v. *Vermont*, 144 U. S. 323, 340):

> "The State may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard of cruelty if it should count the drops in a single glass and make thereby a thousand offenses * * *. It does not alter its character as cruel and unusual, that for each distinct offense there is a small punishment, if when they are brought together and one punishment for the whole is inflicted it becomes one of excessive severity."

Thirdly, the offenses involved no moral turpitude or venal motives. The trial court's instructions eliminated any mens rea (*supra*, p. 5, *infra*, p. 55). And it is clear that appellant acted as it did not for private gain or any sordid purpose, but to protect its rights of dissent and conscience, the constitutional privilege of its officers, and the privacy of its members (*supra*, pp. 3, 4, 25).

Fourthly, no other federal registration statute, so far as we can discover, is so extraordinarily vindictive as to

penalize each day of failure to register by a fine of $10,000 and, for the individual, imprisonment of five years as well.[22] Appellant has been punished so severely not because of the enormity of the offenses, but because of hostility against it.

Finally, this is a test case, and it is not appellant's doing that the test could be made only by violating the Act. On judicial review of the Board's order in the Supreme Court, appellant urged that the order unconstitutionally compelled the self-incrimination of appellant's officers. Although the issue was admittedly substantial—the four Justices who considered the subject agreed with appellant—a bare majority refused to decide it in what Justice Black accurately described as "one of the most truncated judicial reviews that the history of this Court can afford." *Communist Party* v. *S.A.C.B.*, 367 U. S. 1, 147.

In view of this circumstance, the fine violates due process as well as the Eighth Amendment. Since *Ex Parte Young*, 209 U. S. 123, it has been settled that due process requires the existence of a civil remedy to test the validity of an administrative order for disobedience of which cumulating criminal penalties are imposed. It follows that if no such civil remedy is available, cumulating criminal penalties cannot be inflicted. This was recognized by Justice Holmes in *Gulf, C. & S. F. Co.* v. *Texas*, 246 U. S. 58, 62. The majority of the Supreme Court closed the civil avenue for determining whether the registration order may constitutionally be enforced against appellant. Therefore the daily cumulative penalties of the Act cannot validly be levied for the period necessary to determine the constitutional question in this criminal proceeding.

The Act's criminal penalties began to run on November 20, 1961, the date to which the first count of the indictment

---

[22] Contrast, e.g., the non-cumulative penalties for failure to register under the Foreign Agents Registration Act (22 U. S. C. 618) and the Lobbying Act (2 U. S. C. 269).

refers (J.A. 2). If the Court sustains the daily cumulation of penalties, the criminal liability of appellant and its officers will be astronomical before it is possible to get a final judicial determination of the serious constitutional questions which this case poses. Thus appellant could suffer financial strangulation and its officers life imprisonment simply for attempting to secure an adjudication of their constitutional rights.

By imposing cumulative penalties and a fine of more than a nominal amount, the District Court violated the Eighth Amendment and due process.

VII. The District Court erred in refusing to dismiss the indictment because of the presence of government employees on the grand jury. If the refusal was justified, it was error to deny the motion for a hearing on the qualifications of the grand jurors.

Thirteen of the twenty-three members of the indicting grand jury were government employees, and two others were retired government employees. Some of these were employees of sensitive agencies, three being employed by the Department of the Army, one retired from Army employ, and one each employed by the State Department, the Naval Research Laboratory, and the President's Special Assistant for Science and Technology. Still other grand jurors may have been spouses, parents or children of government employees (J.A. 11).

Prior to trial, appellant moved to dismiss the indictment because of the presence of the government employees on the grand jury. Appellant also moved for a hearing on the qualifications of the grand jurors. In support of the motions appellant's counsel filed an affidavit and offer of proof, the gist of which was that by reason of the government's anti-Communist orientation, the conditioning of government employees, public and private pressures, and the general

climate of opinion, federal employees as a class were psychologically disabled from disagreeing with accusations placed against appellant by the prosecutors. The District Court denied the motions without stating its grounds (J.A. 8, 10-17).

There is, as yet, no definitive rule governing the extent to which a federal grand jury must be free from bias. On two occasions the Supreme Court has referred to the Fifth Amendment as contemplating "a legally constituted and unbiased grand jury." *Costello* v. *United States,* 350 U. S. 359, 363; *Lawn* v. *United States,* 355 U. S. 339, 349. And in *Emspak* v. *United States,* 91 App. D. C. 378, 383, 203 F. 2d 54, 58, rev'd on other grounds, 349 U. S. 190, the prevailing opinions of the en banc court assumed that an indictment would be voided if there was an adequate showing that the grand jury was biased "in respect to the accused as a person" or "in respect of the particular matter at hand." See also 91 App. D. C. at 380, 203 F. 2d at 56.

On principle, the minimum position must be that a grand jury which cannot fulfill its constitutional function is disqualified. This function is not merely to supply the mechanics by which prosecutions are instituted. The purpose of the Bill of Rights is to safeguard the liberties of the people. The historic contribution of the grand jury toward this end was to provide a democratic restraint on the prosecutorial power by interposing between the sovereign and the subject the popular will as reflected by a representative segment of the community. The constitutional purpose of the grand jury, therefore, is "to stand between the prosecutor and the accused" (*Hale* v. *Henkel,* 201 U. S. 43, 59), affording "a protection against oppressive action of the government" (*Ex Parte Bain,* 121 U. S. 1, 10-11).

An indictment must be dismissed if, because of systematic exclusion of women, minorities, or other classes, the grand jury is not representative of the community. *Ballard* v. *United States,* 329 U. S. 187; cf. *Cassell* v. *Texas,*

refers (J.A. 2). If the Court sustains the daily cumulation of penalties, the criminal liability of appellant and its officers will be astronomical before it is possible to get a final judicial determination of the serious constitutional questions which this case poses. Thus appellant could suffer financial strangulation and its officers life imprisonment simply for attempting to secure an adjudication of their constitutional rights.

By imposing cumulative penalties and a fine of more than a nominal amount, the District Court violated the Eighth Amendment and due process.

VII. The District Court erred in refusing to dismiss the indictment because of the presence of government employees on the grand jury. If the refusal was justified, it was error to deny the motion for a hearing on the qualifications of the grand jurors.

Thirteen of the twenty-three members of the indicting grand jury were government employees, and two others were retired government employees. Some of these were employees of sensitive agencies, three being employed by the Department of the Army, one retired from Army employ, and one each employed by the State Department, the Naval Research Laboratory, and the President's Special Assistant for Science and Technology. Still other grand jurors may have been spouses, parents or children of government employees (J.A. 11).

Prior to trial, appellant moved to dismiss the indictment because of the presence of the government employees on the grand jury. Appellant also moved for a hearing on the qualifications of the grand jurors. In support of the motions appellant's counsel filed an affidavit and offer of proof, the gist of which was that by reason of the government's anti-Communist orientation, the conditioning of government employees, public and private pressures, and the general

climate of opinion, federal employees as a class were psychologically disabled from disagreeing with accusations placed against appellant by the prosecutors. The District Court denied the motions without stating its grounds (J.A. 8, 10-17).

There is, as yet, no definitive rule governing the extent to which a federal grand jury must be free from bias. On two occasions the Supreme Court has referred to the Fifth Amendment as contemplating "a legally constituted and unbiased grand jury." *Costello* v. *United States,* 350 U. S. 359, 363; *Lawn* v. *United States,* 355 U. S. 339, 349. And in *Emspak* v. *United States,* 91 App. D. C. 378, 383, 203 F. 2d 54, 58, rev'd on other grounds, 349 U. S. 190, the prevailing opinions of the en banc court assumed that an indictment would be voided if there was an adequate showing that the grand jury was biased "in respect to the accused as a person" or "in respect of the particular matter at hand." See also 91 App. D. C. at 380, 203 F. 2d at 56.

On principle, the minimum position must be that a grand jury which cannot fulfill its constitutional function is disqualified. This function is not merely to supply the mechanics by which prosecutions are instituted. The purpose of the Bill of Rights is to safeguard the liberties of the people. The historic contribution of the grand jury toward this end was to provide a democratic restraint on the prosecutorial power by interposing between the sovereign and the subject the popular will as reflected by a representative segment of the community. The constitutional purpose of the grand jury, therefore, is "to stand between the prosecutor and the accused" (*Hale* v. *Henkel,* 201 U. S. 43, 59), affording "a protection against oppressive action of the government" (*Ex Parte Bain,* 121 U. S. 1, 10-11).

An indictment must be dismissed if, because of systematic exclusion of women, minorities, or other classes, the grand jury is not representative of the community. *Ballard* v. *United States,* 329 U. S. 187; cf. *Cassell* v. *Texas,*

339 U. S. 282; *Hernandez* v. *Texas*, 347 U. S. 475, 477; *Pierre* v. *Louisiana*, 306 U. S. 354, 357. This is because a discriminatorily selected grand jury cannot provide a democratic interposition between the government and the accused. A grand jury is even less capable of performing its function if it cannot exercise an independent judgment or resist the demands of the prosecutor.

Such was the situation in this case with a grand jury composed of a majority of government employees. It is an axiom of our government that appellant is an enemy of the nation and a seditious agent of the Soviet Union. To the government servant, taking the side of the Communist Party is the same as taking sides against the government. As appellant's offer of proof recited, "The discipline which government employees are under, the expressed sentiments of their superiors in office, the attitude of their associates, the governmental policies they effectuate, all inevitably create a disposition which prevents them from exercising an independent judgment as grand or petit jurors in this case" (J.A. 13).

The claim held unsubstantiated in *Emspak* was that the government loyalty order had created a climate of fear which prevented government employees from objectively judging individuals involved in Congressional investigations of Communism. There was, of course, no claim that hostility to the defendant was a national policy. There is such a national policy vis-a-vis appellant.

Moreover, Emspak was not indicted under a statute which was specifically directed at him. The indictment here, however, is laid under a statute which is aimed squarely at appellant and finds (sec. 2(15)) that appellant is a clear and present danger to the national security.

Finally, the accusation in this case is significantly different from that in *Emspak*. Here appellant was charged with wilfully failing to register as a seditious agent of the

Soviet Union. Acceptance of this characterization of appellant is a prerequisite of government employee loyalty and acceptability. Having government employees on the grand jury in this case was comparable to calling a grand jury of bishops to decide whether to indict Satan for refusing to confess heresy.

VIII. The trial court erroneously instructed the jury on the required mens rea.

The indictment charges appellant with "willfully" failing to register and file a registration statement (J.A. 2, 7). It was the view of the trial judge, however, that the government was required to prove only that appellant's failure to file the prescribed forms was intentional and deliberate, and he so instructed the jury (J.A. 42-43). Accordingly, he gave no instruction on the meaning of the term "willfully" and refused to charge that it denotes presence of an evil purpose and absence of a justifiable excuse (J.A. 73-74). He likewise declined to charge that appellant was not guilty if the jury found that it and its officers believed in good faith that they had a constitutional privilege not to register and file the registration statement (J.A. 75). The charge and refusals to charge were erroneous.

"We recently pointed out that 'wilful' is a word 'of many meanings, its construction being often influenced by its context.' * * * But 'when used in a criminal statute it generally means an act done with a bad purpose.' * * * In that event something more is required than the doing of the act proscribed by the statute * * * An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime * * * And that issue must be submitted to the jury under appropriate instructions." *Screws* v. *United States*, 325 U. S. 91, 101. To the same effect, see *Heikkinen* v. *United States*, 355 U. S. 273, 279; *United States* v. *Murdock*, 290 U. S. 389, 394.

Murdock adopted this interpretation of "willful" in a factual setting strikingly similar to that presented here. The indictment there charged the defendant with wilful failure to supply information in violation of the Revenue Act because of his refusal to answer questions when summoned before a revenue agent. The defendant had based his refusal on a claim of privilege, asserting that his answers might incriminate him under state law. At the time of the refusal it had not been definitely settled that a claim of privilege on this ground was invalid. The question was decided by the Supreme Court only upon appeal of the defendant's conviction at his first trial. In the cited case, the Court reversed a conviction on retrial because the trial court excluded from the jury's consideration a defense of good-faith reliance on the privilege.

The trial judge disregarded the decision in *Murdock* and gave no instruction on the meaning of the term "willful" apparently on the theory that the term does not appear in the Act and hence that its use in the indictment should be treated as surplusage. The draftsman of the indictment construed the Act as importing the element of wilfulness. That construction was correct.

"The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States,* 341 U. S. 494, 500. Accordingly, criminal intent in the sense of an evil purpose has frequently been imported into a statute notwithstanding that its text does not specify any mental element as an ingredient of the offense. *Morrissette* v. *United States,* 342 U. S. 246; *Levine* v. *United States,* 104 App. D. C. 281, 261 F. 2d 747; *Zebouni* v. *United States,* 226 F. 2d 826; *United States* v. *Kemble,* 197 F. 2d, 316.

Section 15 of the Act should be read to require a similar mens rea because the punishment it imposes is severe—heavy, cumulative fines for organizations, and like fines and

long, cumulative jail sentences for individuals—and because the Act's requirements restrain freedom of speech and association. See *Communist Party* v. *S.A.C.B.*, 367 U. S. 1, 88-105. Cf. *Smith* v. *California*, 361 U. S. 147, 150, 154.

IX. Appellant's failure to file a registration statement, charged in Count XII, is not punishable because the statement makes demands which are excessively vague and which require the reporting of information which appellant cannot obtain.

The registration statement calls for the number of appellant's members on the date of execution of the statement and the names, addresses, and all other names ever used, of its members during the preceding twelve months (J.A. 61-62).

The determination of who are or were the "members" of appellant must be made in accordance with the criteria set forth in section 5 of the Communist Control Act, 50 U. S. C. 844. Even if that section should not be held controlling, the same criteria are applicable by virtue of *Killian* v. *United States*, 368 U. S. 231. Under *Killian* (at 249), "membership" in the Communist Party is a "subjective fact," dependent on the mental state of the person claimed to be a "member." Under section 5 and *Killian*, the facts which should be taken into account in determining this mental state are not only extremely vague, but include matters which cannot possibly be known to appellant or its officers. Thus "membership" of an individual may depend on whether he ever attended *any* type of Communist Party gathering; ever conferred with other "members" "in behalf of any plan or enterprise" of appellant; ever spoken or otherwise communicated plans of appellant; ever "advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members

of the Communist Party or to anyone else, in behalf of the Communist Party;" ever indicated in any way a willingness to carry out in any manner and to any degree the plans, objectives or designs of appellant; ever participated in any other way in the activities, planning or actions of appellant. See *Killian* v. *United States, supra,* at 246, ftnote 5. Obviously, no organization does or can keep records of this type of activity and association, nor can an organization ascertain the subjective attitudes of all the individuals whose attitudes may make them "members." It is, therefore, impossible for appellant or its officers to determine who are or were the "members" who must be listed in Form IS-51.

Paragraph 12 of Form IS-51 (J.A. 62) calls for information concerning printing and duplicating devices "in the possession, custody, ownership or control" of, among others, appellant's "members, affiliates, associates or any group or groups in which" appellant's "members have an interest." This paragraph not only again involves an identification of appellant's "members," but also the impossible task of determining who are its "affiliates" and "associates." Even if appellant were somehow able to determine the identity of these "members, affiliates and associates," how can it know what printing and duplicating devices are in their "possession, custody, ownership or control"? And if it could manage to hurdle that obstacle, how could it find out what printing and duplicating devices are in the possession, custody or control of all the groups in which the "members" have an interest? If a "member" of appellant owns stock in General Motors, how is appellant to know that fact, or to find out what printing and duplicating devices are held by General Motors, let alone such required details as their "description, make, model and serial number"?

Accordingly, if appellant's officers attempted to comply with paragraphs 11 and 12 of the form, they would incur

the enormous penalties of 5 years imprisonment and $10,000 fine for each inevitable "false statement" and omission. Act, sec. 15(b).

It is a violation of due process to punish appellant for non-compliance with these demands for information which are extravagantly vague and impossible to comply with. Cf. *Cramp* v. *Board of Public Instruction*, 368 U. S. 278. Furthermore, since two key paragraphs of the registration statement are of this character, appellant cannot be punished for failing to execute other parts of the statement. Where a demand for information is partly good and partly bad, one cannot be punished for non-compliance with the part that is good. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221; *United States* v. *Patterson*, 92 App. D. C. 222, 224, 206 F. 2d 433, 434; see *St. Regis Paper Co.* v. *United States*, 368 U. S. 208, 252.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

JOHN J. ABT
320 Broadway
New York 7, N. Y.,

JOSEPH FORER
711 14th Street, N. W.
Washington 5, D. C.
Attorneys for Appellant

APPENDIX—STATUTES AND REGULATIONS INVOLVED

1. Subversive Activities Control Act

The Internal Security Act of 1950, 64 Stat. 987, 50 U. S. C. 781 ff., as amended, provides in part as follows:

• • •

NECESSITY FOR LEGISLATION

SEC. 2. As a result of evidence adduced before various committees of the Senate and House of Representatives, the Congress hereby finds that—

(1) There exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization.

(2) The establishment of a totalitarian dictatorship in any country results in the suppression of all opposition to the party in power, the subordination of the rights of individuals to the state, the denial of fundamental rights and liberties which are characteristic of a representative form of government, such as freedom of speech, of the press, of assembly, and of religious worship, and results in the maintenance of control over the people through fear, terrorism, and brutality.

(3) The system of government known as a totalitarian dictatorship is characterized by the existence

of a single political party, organized on a dictatorial basis, and by substantial identity between such party and its policies and the government and governmental policies of the country in which it exists.

(4) The direction and control of the world Communist movement is vested in and exercised by the Communist dictatorship of a foreign country.

(5) The Communist dictatorship of such foreign country, in exercising such direction and control and in furthering the purposes of the world Communist movement, establishes or causes the establishment of, and utilizes, in various countries, action organizations which are not free and independent organizations, but are sections of a world-wide Communist organization and are controlled, directed, and subject to the discipline of the Communist dictatorship of such foreign country.

(6) The Communist action organizations so established and utilized in various countries, acting under such control, direction, and discipline, endeavor to carry out the objective of the world Communist movement by bringing about the overthrow of existing governments by any available means, including force if necessary, and setting up Communist totalitarian dictatorships which will be subservient to the most powerful existing Communist totalitarian dictatorship. Although such organizations usually designate themselves as political parties, they are in fact constituent elements of the world-wide Communist movement and promote the objectives of such movement by conspiratorial and coercive tactics, instead of through the democratic processes of a free elective system or through the freedom-preserving means employed by a political

party which operates as an agency by which people govern themselves.

(7) In carrying on the activities referred to in paragraph (6), such Communist organizations in various countries are organized on a secret, conspiratorial basis and operate to a substantial extent through organizations, commonly known as "Communist fronts", which in most instances are created and maintained, or used, in such manner as to conceal the facts as to their true character and purposes and their membership. One result of this method of operation is that such affiliated organizations are able to obtain financial and other support from persons who would not extend such support if they knew the true purposes of, and the actual nature of the control and influence exerted upon, such "Communist fronts".

(8) Due to the nature and scope of the world Communist movement, with the existence of affiliated constituent elements working toward common objectives in various countries of the world, travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite for the carrying on of activities to further the purposes of the Communist movement.

(9) In the United States those individuals who knowingly and willfully participate in the world Communist movement, when they so participate, in effect repudiate their allegiance to the United States, and in effect transfer their allegiance to the foreign country in which is vested the direction and control of the world Communist movement.

(10) In pursuance of communism's stated objectives, the most powerful existing Communist dictatorship has, by the methods referred to above,

already caused the establishment in numerous foreign countries of Communist totalitarian dictatorships, and threatens to establish similar dictatorships in still other countries.

(11) The agents of communism have devised clever and ruthless espionage and sabotage tactics which are carried out in many instances in form or manner successfully evasive of existing law.

(12) The Communist network in the United States is inspired and controlled in large part by foreign agents who are sent into the United States ostensibly as attaches of foreign legations, affiliates of international organizations, members of trading commissions, and in similar capacities, but who use their diplomatic or semi-diplomatic status as a shield behind which to engage in activities prejudicial to the public security.

(13) There are, under our present immigration laws, numerous aliens who have been found to be deportable, many of whom are in the subversive, criminal, or immoral classes who are free to roam the country at will without supervision or control.

(14) One device for infiltration by Communists is by procuring naturalization for disloyal aliens who use their citizenship as a badge for admission into the fabric of our society.

(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks

converts far and wide by an extensive system of schooling and indoctrination. Such preparation by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the naturn and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.

DEFINITIONS

SEC. 3. For the purpose of this title—

• • •

(3) The term "Communist-action organization" means—

(a) any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world Communist movement as referred to in section 2 of this title;

• • •

(5) The term "Communist organization" means any Communist-action organization, Communist-front organization, or Communist-infiltrated organization.

• • •

CERTAIN PROHIBITED ACTS

SEC. 4. (a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 3 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however*, That this subsection shall not apply to the proposal of a constitutional amendment.

• • •

(d) Any person who violates any provision of this section shall, upon conviction thereof, be punished by a fine of not more than $10,000, or imprisonment for not more than ten years, or by both such fine and such imprisonment, and shall, moreover, be thereafter ineligible to hold any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

• • •

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 7 or section 8 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

• • •

REGISTRATION AND ANNUAL REPORTS OF COMMUNIST ORGANIZATIONS

SEC. 7. (a) Each Communist-action organization (including any organization required, by a final order of the Board, to register as a Communist-action organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-action organization.

(b) Each Communist-front organization (including any organization required, by a final order of the Board, to register as a Communist-front organization) shall, within the time specified in subsection (c) of this section, register with the Attorney General, on a form prescribed by him by regulations, as a Communist-front organization.

(c) The registration required by subsection (a) or (b) shall be made—

• • •

(3) in the case of an organization which by a final order of the Board is required to register, within thirty days after such order becomes final.

(d) The registration made under subsection (a) or (b) shall be accompanied by a registration statement, to be prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the following information:

(1) The name of the organization and the address of its principal office.

(2) The name and last-known address of each individual who is at the time of filing of such registra-

tion statement, and of each individual who was at any time during the period of twelve full calendar months next preceding the filing of such statement, an officer of the organization, with the designation or title of the office so held, and with a brief statement of the duties and functions of such individual as such officer.

(3) An accounting, in such form and detail as the Attorney General shall by regulations prescribe, of all moneys received and expended (including the sources from which received and the purposes for which expended) by the organization during the period of twelve full calendar months next preceding the filing of such statement.

(4) In the case of a Communist-action organization, the name and last-known address of each individual who was a member of the organization at any time during the period of twelve full calendar months preceding the filing of such statement.

(5) In the case of any officer or member whose name is required to be shown in such statement, and who uses or has used or who is or has been known by more than one name, each name which such officer or member uses or has used or by which he is known or has been known.

(6) A listing, in such form and detail as the Attorney General shall by regulation prescribe, of all printing presses and machines including but not limited to rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines, monotype machines, and all other types of printing presses, typesetting machines or any mechanical devices used

or intended to be used, or capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership, or control of the Communist-action or Communist-front organization or its officers, members, affiliates, associates, group, or groups in which the Communist-action or Communist-front organization, its officers or members have an interest.

(e) It shall be the duty of each organization registered under this section to file with the Attorney General on or before February 1 of the year following the year in which it registers, and on or before February 1 of each succeeding year, an annual report, prepared and filed in such manner and form as the Attorney General shall by regulations prescribe, containing the same information which by subsection (d) is required to be included in a registration statement, except that the information required with respect to the twelve-month period referred to in paragraph (2), (3), or (4) of such subsection shall, in such annual report, be given with respect to the calendar year preceding the February 1 on or before which such annual report must be filed.

(f)(1) It shall be the duty of each organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records and accounts of moneys received and expended (including the sources from which received and purposes for which expended) by such organization.

(2) It shall be the duty of each Communist-action organization registered under this section to keep, in such manner and form as the Attorney General shall by regulations prescribe, accurate records of the names and addresses of the members of such organization and of persons who actively participate in the activities of such organization.

* * *

(h) In the case of failure on the part of any organization to register or to file any registration statement or annual report as required by this section, it shall be the duty of the executive officer (or individual performing the ordinary and usual duties of an executive officer) and of the secretary (or individual performing the ordinary and usual duties of a secretary) of such organization, and of such officer or officers of such organization as the Attorney General shall by regulations prescribe, to register for such organization, to file such registration statement, or to file such annual report, as the case may be.

* * *

REGISTRATION PROCEEDINGS BEFORE BOARD

SEC. 13. (a) Whenever the Attorney General shall have reason to believe that any organization which has not registered under subsection (a) or subsection (b) of section 7 of this title is in fact an organization of a kind required to be registered under such subsection, or that any individual who has not registered under section 8 of this title is in fact required to register under such section, he shall file with the Board and serve upon such organization or individual a petition for an order requiring such organization or individual to register pursuant to such subsection or section, as the case may be.

* * *

(g) If, after hearing upon a petition filed under subsection (a) of this section, the Board determines—

(1) that an organization is a Communist-action organization or a Communist-front organization, as the case may be, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such organization an order requiring such organization to register as such under section 7 of this title;

* * *

JUDICIAL REVIEW

SEC. 14. • • •

(b) Any order of the Board issued under section 13, or subsection (f) of section 13A, shall become final—

• • •

(4) upon the expiration of ten days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Board be affirmed or the petition for review dismissed.

PENALTIES

SEC. 15. (a) If there is in effect with respect to any organization or individual a final order of the Board requiring registration under section 7 or section 8 of this title—

(1) such organization shall, upon conviction of failure to register, to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such offense by a fine of not more than $10,000, and

(2) each individual having a duty under subsection (h) of section 7 to register or to file any registration statement or annual report on behalf of such organization, and each individual having a duty to register under section 8, shall, upon conviction of failure to so register or to file any such registration statement or annual report, be punished for each such offense by a fine of not more than $10,000, or imprisonment for not more than five years, or by both such fine and imprisonment.

For the purposes of this subsection, each day of failure to register, whether on the part of the organization or any individual, shall constitute a separate offense.

(b) Any individual who, in a registration statement or annual report filed under section 7 or section 8, willfully makes any false statement or willfully omits to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall upon conviction thereof be punished for each such offense by a fine of not more than $10,000, or by imprisonment for not more than five years, or by both such fine and imprisonment. For the purposes of this subsection—

(1) each false statement willfully made, and each willful omission to state any fact which is required to be stated, or which is necessary to make the statements made or information given not misleading, shall constitute a separate offense; and

(2) each listing of the name or address of any one individual shall be deemed to be a separate statement.

2. Current Regulations of the Attorney General

Order No. 250-61, issued by the Attorney General on October 3, 1961, effective October 7, 1961, prescribing regulations to carry out the provisions of sections 7, 8, 9, and 10 of the Subversive Activities Control Act, 28 C. F. R. Part II, provides in part as follows:

Section 11.100. *Administration of Act assigned to internal Security Division.* The administration of sections 7 to 10, inclusive, of the Subversive Activities Control Act of 1950 is assigned to the Internal Security Division, Department of Justice. All communications with respect thereto should be addressed to the Assistant Attorney General, Internal Security Division, Department of Justice, Washington 25, D. C.

• • •

Section 11.200. *Forms for registration of organizations.* Each Communist-action organization and each Communist-front organization which is required to register with the Attorney General shall accomplish such registration on a form hereby designated as Form IS-51a. • • •

Section 11.201. *Form for registration statement of organization.* Registration statements of organizations shall be prepared and filed in duplicate with the Internal Security Division, Department of Justice, Washington 25, D. C. • • • Such registration statement shall be on a form hereby designated as Form IS-51, copies of which are available at the Internal Security Division.

3. Prior Regulations of the Attorney General

Order No. 57-54, issued by the Attorney General on August 27, 1954, prescribing regulations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Acticities Control Act of 1950, 28 C. F. R. Part II, superseded by Order No. 250-61, *supra,* provided in part as follows:

Section 11.200. *Forms for registration of organizations.* Each Communist-action organization and each Communist-front organization which is required to register with the Attorney General shall accomplish such registration on a form hereby designated as Form ISA-1. • • •

CHAMBERS OF JUDGE DANAHER
D.C. Circuit
6-25-63
D

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From a Judgment of the United States District Court for the District of Columbia

---

JOHN J. ABT
320 Broadway
New York 7, N. Y.

JOSEPH FORER
711 14th St. N. W.,
Washington 5, D. C.

Attorneys for Appellant

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

CASES CITED

STATUTES

MISCELLANEOUS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal From a Judgment of the United States District Court for the District of Columbia

---

REPLY BRIEF FOR APPELLANT

I. THE PRIVILEGE AGAINST SELF-INCRIMINATION

The government does not dispute the demonstration in our principal brief (pp. 23-24) that appellant's officers claimed the protection of the privilege in the only way available to them. This tacit concession eliminates from the case the question as to whether appellant's officers "did choose to assert the privilege in some form in which it could be recognized." *Communist Party* v. *S.A.C.B.*, 367

U.S. 1, 110. What remains is the government's hodge podge of contentions to the effect (1) that it is no defense to appellant that compliance with the registration requirements would necessarily violate the privilege claimed by its officers, and (2) that appellant can comply with these requirements without violating the privilege of the officers.

1. The government (Br. 6) cites cases for the familiar principles that the privilege does not protect artificial persons and is a privilege only against *self*-incrimination. From these principles and from the fact that appellant's officers are not parties to this proceeding, the government concludes (*ibid*) that it is no defense to appellant "that it is altogether impossible for it to comply with the registration requirements without incriminating its officers." The conclusion is a non-sequitur. Moreover, it flies in the face of the Supreme Court decision in the *Communist Party* case, *supra*.

There the four dissenting Justices held (pp. 190, 202) that the registration requirements of the Act are unenforceable against the Communist Party because the requirements violate the privilege of the Party's officers. The majority did not hold that this is not the case but merely that it was premature to pass on the existence and extent of the privilege of the officers until they claimed it. The majority did not doubt that a valid claim of privilege by the officers would bar prosecution of the Party for failure to register. This is clear from the passages of the opinion quoted in our principal brief (pp. 12-13). The dissenting Justices so interpreted the position of the majority. Justice Brennan stated (pp. 193-194):

> "I read the Court's opinion as saying that there is no fatal bar to adjudicability of the question [of privilege] merely in the fact that the organization, and not an individual official of the organization, is asserting the privilege in this proceeding . . .
>
> "The issue of justiciability which confronts us is therefore not whether petitioner may raise the Fifth

> Amendment question at all but whether it may do so now.'"[1]

Finally, if the majority had believed that a valid claim of privilege by the officers would not bar enforcement of the registration requirements against the Party, it would have disposed of the privilege question on that ground instead of reserving the question for disposition in an enforcement proceeding.

The government says (Br. 12) that, the Supreme Court having upheld the registration order against appellant, it would be "absurd" to hold the order unenforcable. Yet all nine Justices in the *Party* case thought this a perfectly rational result, and three of them would have disposed of the case accordingly.[2]

(2) Our principal brief (pp. 14-22) demonstrated that the registration requirements compel appellant's officers to incriminate themselves in two separate and distinct ways: (a) They require the officers to make the incriminating admission that they are officers, and (b) they require the officers to furnish the Attorney General with information every item of which would incriminate them. The government's brief does not indicate to which branch of our demonstration the various arguments in its grab-bag are addressed. We group them for reply in accordance with their relevance to one or the other form of self-incrimination shown in our principal brief.

---

[1] Justice Douglas pointed out in his opinion in the *Party* case (at 187-88): "Clearly, this is a situation in which only the Party can effectively assert the privilege of its officers, directors, and members. . . . The Party is the proper party to raise the objection, because no one else can raise it effectively. . . . Since the command to register cannot be separated from the means of registration, an attack is properly made on the incriminating features of the statute by petitioner who is commanded to register." That the appellant has standing to assert the constitutional rights of its members and officers, see also *N. A. A. C. P.* v. *Button*, 371 U. S. 415.

[2] Justice Black thought the order both invalid and unenforceable.

(a) The government argues (Br. 9-10) that the privilege does not protect three persons—Gus Hall, Elizabeth Gurley Flynn and Benjamin J. Davis—from being compelled to identify themselves as officers of appellant. This, it is said, is because they were convicted of Smith Act violations twelve and fifteen years ago, attended the press conference at Party headquarters some six months before the period covered by the indictment and, "as a matter of common knowledge," are still active in Party affairs and have not attempted to conceal their positions of leadership.

There is, of course, no evidence that the individuals in question were officers of appellant during the indictment period, and the government can point to none.[3] Even if they were, there is nothing in this record (or in what the government claims is "common knowledge," if that could be resorted to) which could possibly amount to a waiver of the privilege by Hall, Flynn or Davis. For it is settled that admissions made extra-judicially, in another proceeding, or at a different stage of the same proceeding, do not waive the privilege. *United States* v. *Miranti,* 253 F. 2d 135; *Ballantyne* v. *United States,* 237 F. 2d 657; *Re Neff,* 206 F. 2d 149, and cases therein cited at 152; 8 Wigmore, Evidence (McNaughton Rev. 1961) §§ 2275-2276. The government understandably avoids characterizing its argument as one of waiver, but if it does not assert waiver, it asserts nothing.

Next the government urges (Br. 12-14) that *Blau* v. *United States,* 340 U.S. 159, is "out-moded" by later decisions, including *Dennis* v. *United States,* 391 U.S. 494, and *Scales* v. *United States,* 367 U.S. 203. The latter cases sustained the constitutionality of the Smith Act, affirmed

---

[3] Significantly, the government instituted and is still prosecuting proceedings under thte Immunity Act, 18 U.S.C. 3486, on the representation that ascertainment of the identity of appellant's officers is required by the public interest. *In re Bart,* .... App. D.C. ...., 304 F. 2d 631; *In re Bart,* Misc. No. 8-63, District Court, D.C.

the convictions of Communists under it, and held that section 4(f) of the Act does not bar the prosecution of Communists under the Smith Act's membership clause. We cannot follow what seems to be the government's logic that an admission of membership in the Communist Party has become *less* incriminating as a result of these decisions. If, on the other hand, the government uses the term "outmoded" to suggest that the privilege should be subject to some kind of balancing test where Communism is involved, it is sufficient to point out that the decision of Chief Justice Marshall to which the brief alludes (p. 12) held that the privilege protected a witness where the matter under inquiry was treason. *In re Willie,* Fed. Cas. No. 14,692e.

The government also contends (Br. 13-14) that the "other person" method of executing the registration documents permits an officer to avoid an incriminating admission of his officership. This is so, it is argued, because the officer can designate as the "other person" an individual who is already aware of his officership and to whom, therefore, no further admission is required. The argument ignores two points made in our principal brief (pp. 16-17). First, the forms which the officer is authorizing the "other person" to execute require the latter to show his name, his address, and that he has been authorized to file the forms (J.A. 58, 63). Accordingly, the officer who gives this authority thereby supplies to the Attorney General the name and address of a witness who has knowledge of the incriminating fact that the officer is an officer, and who has waived his privilege against disclosing that fact, even should he desire to assert the privilege. Second, by authorizing the "other person" to file the forms, the officer thereby makes it necessary for the other to list the officer's name on the registration statement as an officer and member of appellant—both incriminating facts—in order to avoid the penalties of section 15(b) for wilful omissions.

For both reasons, the "other person" method could not avoid self-incrimination by an officer even if this method

offered a realistic alternative. And the government has no answer to the showing of our principal brief (pp. 17-18) that the method is unworkable except to repeat (Br. 13-14) the outlandish suggestion that an admission of membership in the Communist Party is not as incriminating as it used to be. Equally outlandish is the further suggestion (Br. 14) that anyone would execute and file the registration documents merely upon receipt through the mails of a letter over the Party's name and seal authorizing him to do so.

Finally on this phase of the privilege issue, our principal brief noted (p. 17, n. 8) that self-incrimination of an officer cannot be avoided by using a lawyer as the "other person" since a lawyer, if called as a witness, would have no professional privilege against compulsory disclosure of the identity of the officer who authorized him to act. Unable to dispute our showing, the government (Br. 15) offers the irrelevancy that a lawyer would not be required to disclose the identity of the officer on the face of the registration documents.

(b) Our principal brief (pp. 18-22) showed that the second way in which the registration requirements violate the privilege is by compelling appellant's officers to supply the information called for by the registration documents, every item of which incriminates them.

The government argues (Br. 6) that, "Because they [appellant's officers] are officers they are not privileged to refuse to furnish the records of the association, *or the information there recorded*" (emphasis supplied). *Curcio* v. *United States*, 354 U.S. 118 is cited as authority for this statement. But *Curcio* is to the contrary. It says (pp. 124-125) of a custodian of corporate or association books that, "By accepting custodianship of records he 'has voluntarily assumed a duty which overrides his claim of privilege' *only* with respect to the production of the records themselves" (emphasis in original). Furthermore, as our prin-

cipal brief showed (p. 22), the registration documents call for information which may not, and probably does not, appear in appellant's records.

The government asserts that the Act requires appellant to keep records of all the information called for by the registration documents. This is palpably untrue. The record-keeping requirements of the Act (sec. 7(f)) apply only to organizations which have registered, and appellant has not registered.

The government relies (Br. 7) on Judge Prettyman's opinion in *Communist Party* v. *S.A.C.B.*, 96 App. D.C. 66, 223 F. 2d 531, as authority for the proposition that the rule of *United States* v. *White*, 322 U.S. 694, extends to the information called for by the registration documents. On this subject, however, the opinion has been repudiated by the Supreme Court. The opinion assumed (223 F. 2d at 546-47)—we think erroneously—that the required information appears in appellant's records, and concluded that appellant's officers can be compelled to furnish it as "auxiliary to the production" of the records. The only authority cited for this extension of *White* was *United States* v. *Field*, 193 F. 2d 92 (C.A. 2), which held that an officer can be compelled to disclose the whereabouts of association records as "auxiliary" to their production. Judge Prettyman dismissed as inapplicable *United States* v. *Daisart Sportswear, Inc.*, 169 F. 2d 856 (C.A. 2), which held that the privilege protects a witness against oral disclosure of the contents of corporate records. Subsequent to Judge Prettyman's opinion, however, the Supreme Court in *Curcio, supra*, at 126-27, expressly overruled the *Field* decision and, at 127, n. 6, quoted with approval the statement in *Daisart* (at 862) that "the production of records must be distinguished from oral testimony as to what the records would contain, had they been produced."

It is clear therefore that Judge Prettyman's opinion on the applicability of *White* is contravened by *Curcio*. The

error of the opinion also appears from the Supreme Court opinions in the *Party* case. There the four dissenting Justices held that the rule in *White* is inapplicable to the information called for by the registration documents. Justice Douglas stated (367 U.S., at 179):

> "The compiling, the signing and the filing of the registration statements required of officers, directors and others by the registration form is a form of elicited testimony, not the surrender of pre-existing records. Where, as here, such disclosure will reveal knowledge of and relations with the Communist Party, I do not see how it can be demanded, unless immunity is granted."

Justice Brennan expressed the same view, at 201. It is evident that the majority agreed. For if they had believed that *White* disposed of the privilege issue, they would have held that the officers had no privilege to claim instead of deciding that the issue was premature until a claim of privilege was made.[4]

Finally, the government argues (Br. 11) that some of the information called for by the registration documents is not within the privilege because it would not incriminate the officers who are compelled to supply it. From the mass of material which the documents demand, the government can cite only four items which, it claims, are non-incriminating: Appellant's name, its address, the names of the banks it uses, and the total number of its members.

Appellant cannot be convicted for failing to furnish the first two items to the Attorney General, because it did so prior to the registration deadline (J.A. 70-71; Appellant's Br. 25, 50). The other two items are obviously incriminating. The identity of appellant's banks would, at a mini-

---

[4] It is also an open question whether the *White* doctrine applies at all in connection with governmental regulation of associational activity in political rather than economic areas. See *White* at 700; Justice Douglas' dissent in the *Party* case, at 182-83.

mum, provide a lead to the magnitude of its receipts and expenditures.[5] Evidence of this and of the size of appellant's membership would be relevant in a conspiracy prosecution of the officers under section 4(a) of the Act seeking to prove that the defendants were "substantially" contributing to the establishment of a foreign-controlled totalitarian dictatorship in this country. The same evidence would be relevant in a Smith Act conspiracy case to show that the conspiracy constituted a clear and present danger. Thus the government's examples merely serve to confirm the statement in our principal brief (p. 19) that under existing criminal statutes, any information about the personnel or activities of appellant would incriminate the officer who supplied it.

II. COERCED SELF-DEFAMATION

The government does not dispute our premise that appellant cannot constitutionally be compelled to declare itself to be a Communist-action organization. It argues (Br. 15-16) that Form IS-51a (J.A. 57) imposes no such compulsion because it does not require appellant to describe itself as a Communist-action organization, but merely to certify that it "hereby registers as a Communist-action organization."

The government itself recognizes that the test is the plain implication of the language which is exacted, for it says (Br. 17) that the Labor Board "may not . . . order a statement which plainly implies an admission of past violation." By the plainest implication, appellant by executing Form IS-51a would acknowledge itself to be a Communist-action organization. Any contrary assertion is frivolous. Nor does the government explain what function the form serves if it does not coerce an invidious self-

---

[5] If the banks are among those which photostat customers' checks, the information would also provide a lead to the nature of appellant's expenditures.

characterization, in view of the fact that the form has no information-gathering utility (see Appellant's Br. 25).[6]

III. DENIAL OF A JURY TRIAL ON THE ISSUE OF WHETHER APPELLANT IS A COMMUNIST-ACTION ORGANIZATION

It is true, of course, and we never disputed, that the Act eliminated from the trial of this case any issue as to whether appellant is a Communist-action organization. Our contention is that this feature of the Act is unconstitutional. It is no answer that Congress "has the power to define crimes aganst the United States" (Appellee's Br. 18). The question is whether the power to define federal crimes enables Congress to make disobedience of an administrative order ipso facto criminal, thereby eliminating a judicial trial of the facts which are requisites to the constitutional validity of the order. If the answer is in the affirmative, it is apparent that Congress can at will dispense with the constitutional limitations on criminal prosecutions, including the right to a judicial trial, trial by petit jury, trial in the vicinage, indictment by grand jury, and the need to establish guilt beyond a reasonable doubt. All that Congress has to do to escape from these restrictions is to commit to administrative determination all the elements of the conduct desired to be punished, and then provide criminal punishment for non-compliance with onerous requirements of the administrative order. That is what the Act does.

It would be equally destructive of constitutional safeguards if a determination of their applicability to the trial of crimes should be governed, as the government suggests (Br. 20), by analogy to the principles relating to the judicial power to punish for criminal contempt. The contempt power is *sui generis* and is not subject to the constitutional

---

[6] Equally frivolous is the government's additional argument (Br. 16) that registration would not be an admission or a foreswearing of appellant's belief because the registration is compelled and because section 4(f) of the Act makes the fact of registration inadmissible in a prosecution of the registrant.

limitations on criminal prosecution. *Green* v. *United States*, 356 U.S. 165, 183-87, 189-91, 193-219.[7]

IV. THE VOIR DIRE EXAMINATION

1. The government's general contention is that the questions the trial court asked on voir dire "covered in whole *or in part* the subject matters which would or might have given rise to prejudice or a disqualifying opinion" (Br. 27, emphasis supplied), and that "[t]aken as a whole the *voir dire* was calculated to elicit from the jurors any reason any of them might have to be biased" (Br. 23).[8]

We do not understand how an examination which covered the relevant subject matter only "in part" can be adequate when "taken as a whole." But if the government is trying to convey the impression that the skimpy voir dire examination in fact covered subjects to which the rejected questions related, it is palpably mistaken. For example, the trial court asked no questions as to whether the jurors had personal animus against appellant (our requested questions 1 through 5), had formed an opinion as to appellant's guilt or innocence (question 6), would be embarrassed or encounter problems if they voted to acquit (question 25), or would have difficulty in according appellant the benefit of the presumption of innocence (question 26). None of these questions was even remotely included in such ques-

[7] We need not discuss the government's reliance (Br. 19-20) on *Yakus* v. *United States*, 321 U.S. 414, and *Cox* v. *United States*, 332 U.S. 442, as these arguments were anticipated in our principal brief (pp. 32-33).

[8] The government also adds (Br. 23) that the jurors "were instructed that they should be impartial, should decide the case only on the evidence, and to keep an open mind (J.A. 32)." Even if this were true, it would be irrelevant to the question of whether an adequate voir dire was conducted. In fact, the statement is grossly untrue, as is the subsequent, unannotated representation (Br. 25) that the trial court gave instructions to "exorcise" any prejudice. All that supports these statements is the trial court's admonition at the end of the first court day, after conclusion of the voir dire: "And, in conclusion, one parting word, keep an open mind until the trial is finished and the case is submitted to you for final decision" (J.A. 32).

tions as whether the jurors belonged to certain organizations or subscribed to certain periodicals. Again, the jurors' denial of having testified before certain committees did not indicate whether any of them had been undercover anti-Communist informers (questions 17 and 19). Nor did a denial of subscribing to The National Review and other named periodicals gave any information as to whether the jurors had had their minds poisoned against appellant by the radio programs of Fulton Lewis, Jr. and others (question 24) or by the books of Elizabeth Bentley, Louis Budenz, and others (question 20). The fact is that the voir dire would have better served the function of eliminating partial jurors if the trial judge had asked what he rejected and omitted what he asked.

2. In its seven page treatment of the voir dire, the government say at least three times (Br. 21, 27, 28) that the conduct of the voir dire is within the trial court's discretion. The government's discussion of the court's exclusionary rulings fortifies our demonstration that the discretion was abused. For with one exception,[9] the government dose not attempt to defend the rulings on the grounds stated by the trial court. Instead it offers new justifications which are, if possible, even more preposterous than those of the court. Hence we need hardly do more than state them.

(a) The trial judge rejected five questions designed to ascertain if the jurors had personal animus against appellant, on the ground that the questions would have been affirmatively answered (Appellant's Br. 37). The government admits that the "questions might have been proper," but justifies the ruling on the ground that the questions "might well have given [the jurors] an impression that they should as jurors be hostile to the Communist Party" (Br. 23).

---

[9] Like the trial court, the government considers requested question 23 too vague (Br. 25). We disagree (Appellant's Br. 47).

This rare solicitude for our client's welfare does not prevent the government from relying on misleading descriptions of *United States* v. *Barra,* 149 F. 2d 489, and *United States* v. *Dennis,* 183 F. 2d 201.

The government says that in *Barra* the trial court was upheld in refusing to ask jurors "questions designed to discover whether membership in the Nazi Party would prejudice them" (Br. 23, ftn. 20). *Barra* was a prosecution for making a statement to the government which falsely denied the defendant's membership in the Nazi Party. The trial court refused to ask the prospective jurors whether the defendant's membership in the Nazi Party, if shown, would prejudice them in any way. The requested question, therefore, amounted to asking the jury if they would be "prejudiced" by evidence of guilt. For this reason, the appellate court sustained the refusal, explaining, "To expect jurors to deny that they will be influenced by facts which, if unexplained, should certainly influence them is to look for jurors either dishonest or hopelessly confused. . . ." (at 490). Obviously, *Barra* has no relevance to this case.

The government states that in *Dennis,* the trial court declined to ask on voir dire "a series of questions similar to those submitted by them [*sic*] appellant" (Br. 23, ftn. 21). In *Dennis* (see at 226-27), the trial court asked the jury panel questions on subjects, including personal animus, which were excluded in this case.[10] The *Dennis* de-

---

[10] Cf. appellant's rejected question 23 (J.A. 24) with the following asked in *Dennis:* "Have you at any time been a member of, made contributions to, or been associated in any way with business or religious organizations, or organizations of any character, whose officers or representatives have made any expressions of . . . opposition or hostility to Communists or Communism in general . . . ." Cf. appellant's rejected questions 26 and 1-5 (J.A. 25, 21) with the following asked in *Dennis:* "Has any juror such a bias or prejudice . . . against the defendants or Communists in general, or the Communist Party, whatever its aims and purposes may be, as would prevent him from reaching his verdict solely on the evidence presented in Court and the law as contained in the instructions and rulings of the Court?" Cf. appellant's rejected ques-

fendants complained on appeal not, as we do here, that appropriate subjects were not covered at all, but that the Court's questions were worded in such a compound and awkward fashion that it was error to refuse to ask certain simpler, specific questions offered by the defense as supplemental questions. The Second Circuit held that the questions asked by the trial court in an exhaustive voir dire were satisfactory probes for prejudice, including personal bias.[11] The holding does not support the refusal in this case to ask any questions, simple or compound, designed to elicit personal bias and other relevant matters which were covered in *Dennis*.

(b) The trial judge refused to ask the standard question (question 6) as to whether the panel members had formed an opinion as to guilt or innocence, on the mistaken ground that he had already covered the subject in interrogating the panel (Appellant's Br. 39). The government does not claim that the judge asked the panel this question, but considers the omission rectified by the fact that he asked of a *single* panel member, who was excused on the government's challenge for cause (J.A. 20), whether that individual could lay aside everything that he had read or any opinion he may have formed and decide the case on the evidence. This, says the government, "must have been taken by the panel as a general admonition." (Br. 22.) The government's argument compresses in one brief passage three untenable propositions. (1) It erroneously

---

tion 25 (J.A. 24) with the following asked in *Dennis:* "Would you be embarrassed in arriving at or rendering a verdict of not guilty in any way connected with your employment or by reason of your membership in or affiliation with any church, political party, club, society, or any other organization of any kind whatsoever, or in any other manner?" For the quoted questions from *Dennis*, see the opinion at 227, ftn. 35.

11 The voir dire in *Dennis* took eight days (at 227). The voir dire here lasted less than two hours, occupying part of a court session which began at 1:45 p.m. (J.A. 18) and ended at 3:45 p.m. (J.A. 32). In the circumstances, it is unctuous for the government to explain that "an examination which is needlessly detailed or prolonged is not required" (Br. 27).

represents the question asked of the single panel member to be the same as appellant's rejected question 6. (2) It erroneously assumes that excusing one panel member on the prosecutor's challenge for cause "must have been taken" by the whole panel as a general admonition to lay aside opinions adverse to the defendant. (3) It is fantastic to treat an admonition, even when one is given, as a substitute for inquiry on voir dire.

(c) The trial court refused to ask whether any member of the panel had ever been the subject of a government loyalty or security investigation because he did not want to embarrass any prospective jurors who would have had to answer in the affirmative (Appellant's Br. 41-42). The government now explains (Br. 24) that it was proper to reject the question because it was unlikely that any member of the panel would have had to answer affirmatively. It is hardly necessary to add that this prophecy rests on unsound evidentiary grounds—that government employees had been excused, that the court asked whether any juror or member of his family "*is*" an applicant for or engaged in employment subject to security clearance (J.A. 29),[12] and that "only some 20 percent" of privately employed persons have been subjected to loyalty or security scrutiny (Br. 24).

(d) The trial court refused to ascertain if any members of the panel were anti-Communist informers, on the erroneous ground that informers have "a right to remain secret" (Appellant's Br. 42-43). The government abandons this ground in favor of assertions that our concern to exclude informers from the jury is "fanciful" and without "factual foundation" (Br. 26, ftn. 28). The government does not explain how the "factual foundation" could be obtained unless the requested questions were asked, nor why the

---

12 The government seems to overlook the obvious fact that persons who have once been discharged for security reasons are least likely to be currently employed in jobs subject to security clearance.

concern was fanciful in view of the well-known fact that political informers are in large supply.

(e) The trial court refused to ask if the jurors had read anti-Communist books or articles or regularly listened to anti-Communist radio programs, out of a misplaced respect for their privacy (Appellant's Br. 43). The government claims that the refusal of the question on reading was not prejudicial, but gives no ground other than the irrelevant one that the court asked about subscriptions to certain anti-Communist publications (Br. 26). It justifies denial of the question concerning radio programs on the claim that sufficient other questions were asked to afford "a clue" to the presence of "the particular kind of orientation appellant was looking for" (Br. 26, ftn. 27). Understandably, the government does not specify what other questions were asked that gave the clue. Besides, it is an unheard-of doctrine that defendants should be remitted to clues in place of answers to relevant questions.

(f) The trial court refused, on captious grounds, to ask whether any jurors would be embarrassed by voting to acquit or would have difficulty in giving appellant the benefit of the presumption of innocence (Appellant's Br. 46). The government asserts (Br. 26) that the rulings were not abuses of discretion despite *Morford* v. *United States*, 339 U.S. 258, because "that case dealt with the political climate resulting from the 'Loyalty Order.'" The lesson of *Morford* is that a defendant in a hostile political climate may interrogate jurors to ascertain if they are influenced against him by the climate. It stultifies *Morford* to consider it applicable only to government employees and the government's loyalty order.

V. THE ABSENCE OF A DUTY TO FILE A REGISTRATION STATEMENT

Our principal brief showed (pp. 47-49) that an organization is under no duty to file the registration statement required by section 7(d) of the Act unless and until it registers as required by section 4(a). Accordingly, appellant not having registered, its conviction on Count XII for failure to file a registration statement was erroneous.

The government does not dispute our construction of section 7. It merely says (Br. 18, n. 13) that Congress had the power to make failure to file a registration statement a separate offense, and did so in section 15(a). These observations are obviously irrelevant. The offenses which Congress defined in section 15(a) consist of failures to comply with the requirements of section 7. Since section 7 does not require an unregistered organization to file a registration statement, the failure of such an organization to do so is not an offense under section 15(a).

VI. THE UNCONSTITUTIONALITY OF THE SENTENCE

1. The government argues that the cumulation of fines is not excessive for Eighth Amendment purposes because the registration provisions of the Act were enacted "not for purposes of exposure but to regulate Communist organization [*sic*] by requiring disclosure of the names of their officers and members and certain details of their activities." Therefore, it is contended, the alleged offenses were not innocuous and Congress could properly enact the penalties it did in view of "the gravity of the national interest involved and the nature of the danger Congress found." (Br. 28.)

This make no sense if only because the cumulative fines are authorized by the Act, and were imposed, solely for the daily failures to register (i.e., to file Form IS-51a), charged in Counts I through XI, and not for the failure to file a registration statement (Form IS-51), charged in Count

XII. As we repeatedly explained in or principal brief, and as the government must surely be aware, the registration form does not require disclosure of the names of officers, or members, or details of activities. All such information is called for only by the registration statement. Thus the government disingenuously attempts to justify the cumulative penalties for non-filing of the registration form by an argument addressed to the non-cumulating penalty for failure to file the registration statement.

2. The government appears to recognize that under the doctrine of *Ex Party Young*, 209 U.S. 123, the due process clause prohibits cumulating criminal penalties for disobedience of an administrative order which can not be tested by a civil remedy. It distinguishes *Young* on the ground that the statute there involved did not provide judicial review of the administrative order, while here, it is said, "full judicial review" of the Board's registration order is provided by the Act and was had (Br. 29).

This argument is intentionally oblivious to the point made in our principal brief (p. 51) that the Act, as construed by the Supreme Court, did not afford a "full judicial review." The Supreme Court expressly held that it was "premature" on judicial review of the Board's order to decide what is now our first question presented, namely, whether appellant has a constitutional defense against registration by reason of the privilege against self-incrimination of its officers and members. *Communist Party* v. *S.A.C.B.*, 367 U.S. 1, 106-10. The Supreme Court also refused on prematurity grounds to pass on what is now our third question presented—whether appellant can constitutionally be punished for not registering as a Communist-action organization without a judicial trial of the issue of whether it is such an organization.[13] And, of course, it

[13] This question was raised in the Supreme Court, but was not discussed in the Court's opinion, apparently being considered to be one of the "[m]any questions" "prematurely raised in this litigation" (at 71).

was impossible for the Supreme Court to pass on our second question—whether appellant can constitutionally be compelled to forswear itself on the registration form, Form IS-51a —, because the Attorney General adopted that form four months after the Court's decision (see Appellant's Br. 4, 15).

Accordingly, appellant has not heretofore had an opportunity for a judicial determination of serious questions of the constitutionality of requiring it to register pursuant to the Board's order and the Attorney General's regulations. Under *Young,* due process requires that appellant be able to litigate those questions before cumulative penalties can be imposed. Since appellant was denied such an opportunity, the imposition of cumulative penalties for the period prior to the initial judicial decision of the questions was unconstitutional.

The government asserts (Br. 29) that Justice Holmes did not "decide" in *Gulf, C. & S. F. Co.* v. *Texas,* 246 U.S. 58, 62, "that cumulative penalties, validly imposed under a statute, may not be inflicted in the circumstances of this case." Leaving aside the loaded formulation ("cumulative penalties, *validly* imposed"), it is true, of course, that Justice Holmes did not have before him "the circumstances of this case," nor was he sufficiently clairvoyant to foresee them. But he did show his realization that under the logic of *Young,* a litigant "could not be subjected to, at most, more than one penalty [for disobedience of a commission's order] while the order was awaiting judicial determination." *Gulf, C. & S. F. Co.* v. *Texas,* at 62.

VII. THE INVALIDITY OF THE REGISTRATION STATEMENT'S DEMANDS FOR THE LISTING OF MEMBERS AND PRINTING DEVICES

The government does not meet the showing of our principal brief (pp. 57-58) that the demands of the registration statement for the listing of members and printing devices are excessively vague and require information which appellant does not have and cannot obtain. Instead, the government urges (Br. 36) that these demands do not mean what they say and can be satisfied by something less than they ask for.

Thus, it is asserted (*ibid.*) that the registration statement "requires no more than a good faith effort at compliance." But what does "a good faith effort" require of appellant? When it determines "the number and names of the persons it considers to be members" (*ibid*), does "good faith" oblige appellant to take into account the indicia of membership laid down in the Communist Control Act? If so, what efforts must it make to obtain the information necessary for applying these indicia? With respect to printing devices, what standards does "good faith" oblige appellant to apply in determining who are its affiliates, associates or any group or groups in which" its "members have an interest" (J.A. 62)? And what must it do by way of endeavoring to identify such persons and groups, and to ascertain the printing devices in the possession of each?[14]

It is apparent from queries like these that adoption of the government's "good faith" criterion would simply add further uncertainty to the vagueness of the demands as written. Moreover, in view of the government's highly restrictive reading of the term "wilful" (Br. 33-34), little

---

[14] At one point in the government's discussion of the privilege issue it suggests (Br. 11, n. 6) that perhaps it is sufficient for appellant to list only such printing devices as are referred to in its records. This, of course, is not what the registration statement calls for, and the suggestion is abandoned when the government replies to our vagueness point.

comfort can be taken from its protestation (Br. 36) that appellant will be prosecuted only for wilful false statements or omissions.

Our principal brief (p. 59) cited *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221, for the principle that where a demand for information is invalid in part, a refusal to comply with the part that is valid may not be punished. The government (Br. 36) quotes the statement in *St. Regis Paper Co.* v. *United States,* 368 U.S. 208, 224, that *Bowman* "cannot be considered apart from its facts." But the government misstates the facts which the Court thought relevant to the principle announced in *Bowman.* As set forth in *St. Regis,* at 224, they were that the defendant could challenge the contested order to supply information "only by disobeying and appealing the contempt conviciton." A similar situation confronts appellant. It can challenge the demands of the registration statement which it contends are invalid only by disobeying the registration order and appealing the criminal conviction.[15] Accordingly, as in *Bowman,* the invalidity of two of the demands requires reversal of the conviction for appellant's failure to file the registration statement.

Respectfully submitted,

JOHN J. ABT
320 Broadway
New York 7, N. Y.

JOSEPH FORER
711 14th St. N. W.,
Washington 5, D. C.

Attorneys for Appellant

---

[15] The government does not and cannot contend that appellant could have secured an adjudication of its challenge in the proceeding to review the registration order. In the Supreme Court appellant challenged the demands of the registration statement on grounds of vagueness. See Brief for Petitioner, pp. 2, 88-95, in *Communist Party* v. *S.A.C.B.,* 367 U.S. 1. But the Court did not pass on the issue, evidently being of the opinion that it should be reserved, along with others (at 71).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 29 1964

Nathan J. Paulson
CLERK

No. 17,583

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,
Appellant,

v.

THE UNITED STATES OF AMERICA, *Appellee*

Appeal from a Judgment of the United States District Court for the District of Columbia

APPELLANT'S ANSWER TO APPELLEE'S PETITION FOR REHEARING EN BANC

The government's petition for rehearing rests on arguments which are without merit. There are also other considerations which make this case peculiarly inappropriate for en banc reconsideration. Accordingly, the government's petition should be denied.

1. The panel held that appellant's officers were constitutionally privileged to refuse to execute the registration documents because by doing so they would reveal their

identity as officers and thereby incriminate themselves.[1] In contending the contrary, the government first argues (Pet. 2-4) that officers of an organization do not have the privilege against self-incrimination when ordered to give evidence relating to the affairs of the organization. The argument is an extravagant extension of the doctrine of *United States* v. *White,* 322 U.S. 694, that a custodian of organization records is not privileged to withhold them because their contents incriminate him.

The government's argument was fully presented in its brief and is answered at length in our briefs and more succinctly in the panel's opinion. The government also presented the argument to the Supreme Court in *Communist Party* v. *S.A.C.B.,* 367 U.S. 1. The four Justices who reached the issue rejected the government's contention, holding that the registration provisions of the Act violate the privilege of appellant's officers and are therefore invalid. Although the majority held the privilege issue premature, it is evident that they did not consider *White* to be dispositive. Otherwise they would have held that the officers had no privilege to claim instead of postponing decision until after the claim was made.

It would be superfluous to reexamine here the principles and authorities which demonstrate the government's error. It seems appropriate, however, to comment on the government's assertion (Pet. 2) that the panel's opinion "is in conflict with" the "holding" in *Communist Party* v. *S.A.C.B.,* 96 U.S. App. D.C. 66, 223 F. 2d 531 (1954), *reversed,* 351 U.S. 115, that "the privilege of self-incrimination was not a bar to the Party's obligation to register."

We believe that there is no such holding and no such conflict. Furthermore, because of subsequent Supreme

---

[1] In addition, as our brief shows (pp. 18-22), any officer who executed the registration documents would further incriminate himself by supplying the information called for by the documents.

Court decisions, the views expressed in Judge Prettyman's 1954 opinion are not entitled to deference.

(a) Judge Prettyman, like the Supreme Court majority, held that adjudication of the privilege issue was unnecessary to affirmance of the Board's order and hence was premature. Thus he stated (223 F. 2d at 550):

> "We conclude that neither the statute nor the order requiring an organization to register can be held invalid because of the possibility that the person or persons required to sign on behalf of the organization might be called upon to claim a privilege against self-incrimination, or that such a claim if made would be sustained, or that an application for immunity would not be made or would not be validly granted, or that the statute and order might not be enforceable."

It is true that in earlier passages Judge Prettyman expressed the view that the *White* doctrine extends to the information called for by the registration statement (223 F. 2d at 546-47). But this cannot have been intended as a definitive holding in light of his conclusion that the privilege issue was premature. Moreover, Judge Prettyman's view was expressed only with reference to the contention that registration could not be compelled because the *contents* of the registration statement would be incriminating. That view does not conflict with the current panel's holding that the *signing* of the registration documents would incriminate the officers and hence cannot be compelled.

(b) As we have seen, Judge Prettyman's views on the applicability of *White* were repudiated expressly by the four dissenting Justices and impliedly by the majority in the *Party* case. Judge Prettyman's views were also repudiated by *Curcio* v. *United States*, 354 U.S. 118, 124-25, which said of an association's officer: "By accepting custodianship of records he 'has voluntarily assumed a

duty which overrides his claim of privilege' *only* with respect to the production of the records themselves" (emphasis in original). And *Curcio* (at 126-27) expressly disapproved *United States* v. *Field*, 193 F. 2d 92, which was the one case relied on by Judge Prettyman (223 F. 2d at 547, n. 26) for his extension of the *White* doctrine.[2]

2. The government next argues (Pet. 5-7) that some of appellant's officers would not face a real danger of self-incrimination if they executed the registration documents. It is said that the execution of the documents could be incriminating only if (1) the fact of registration could be used as evidence against the officer who signed the documents, or (2) the registration could supply a lead to evidence of the officer's identity. The first of these possibilities, it is claimed, is eliminated by section 4(f) of the Act. The second possibility is said to be non-existent for some of appellant's officers because their identity is already a matter of common knowledge and hence their signatures to the documents would give the government no information it does not already have.[3]

---

2 The panel's decision is correct even if it be assumed that appellant's officers were not privileged to refuse to execute the registration documents. As the panel held, and the government's petition does not dispute, "willfulness is a necessary element of the crime of failing to register" (Op. 13, n. 16). In determining whether the failure of appellant, an association, was willful, it is the mental state of its officers which must be imputed to it. *United States* v. *A. & P. Trucking Co.*, 358 U.S. 121, 125; *New York Central* v. *United States*, 212 U.S. 481. It is undeniable that the officers had at least colorable grounds for believing that the privilege was available to them. Therefore, their refusal to execute the registration documents on claim of privilege was not willful. *Murdock* v. *United States*, 290 U.S. 389 (refusal to supply information not willful when made in mistaken reliance on privilege against self-incrimination). By the same token, appellant's failure could not be willful.

3 The government eliminates a third possibility—that the officer would be incriminated by the contents of the registration documents—on the basis of Judge Prettyman's opinion and *United States* v. *Sullivan*, 274 U.S. 259 (Pet. 7). Our demonstration to the contrary need not be repeated here; it appears in our Brief, pp. 18-22; Reply Brief, 7-9.

This argument contains three fallacies.

(a) There is no evidence in the record of the identity of appellant's officers on the dates of the defaults alleged in the indictment or, indeed, at any other time. There is therefore no factual basis for arguing that the officerships of any or all of these unknown persons is common knowledge or would not be revealed to the government for the first time by their signatures to the registration documents. The government's comments about Gus Hall (Pet. 7) are pointless in the absence of evidence that he was an officer of appellant during the indictment period.

Furthermore, the government's assertions are contradicted by representations it made to this Court and the District Court in another connection. While the appeal here was pending, the government was trying to compel an individual to testify under the Immunity Act, 18 U.S.C. 3486, on its representation that ascertainment of the identity of appellant's officers is required by the public interest. *In re Bart*, 113 U.S. App. D.C. 54, 304 F. 2d 631; proceeding reinstituted Feb. 1963, *In re Bart*, Misc. No. 8-63, District Ct. D. C.

(b) Of course, a person is not stripped of his privilege against self-accusation merely because the government is already in possession of the incriminating information it seeks to elicit from him. The government's thesis seems to be that this proposition is inapplicable here because section 4(f) bars a person's admission of his officership by registration from being used in evidence against him. Hence, it is argued, execution of the registration documents by an officer would incriminate him only if it gave the government a lead, and no such lead is given if the government already knows or suspects that he is an officer. In these circumstances, the government concludes, section 4(f) is an adequate substitute for, and therefore supplants, the privilege.

The government's argument is contradicted by *Counselman* v. *Hitchcock*, 142 U.S. 547, which held that a limited

immunity statute like 4(f) did not oust the privilege, and laid down the rule (at 586) that, "In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates." The Supreme Court has never intimated that this rule is subject to the exception suggested by the government. On the contrary, the Supreme Court has applied the *Counselman* rule so as to vindicate claims of privilege despite 4(f)-type statutes in cases where the government was already in possession of the incriminating information which it sought to elicit from the witness. See, e.g., *Emspak* v. *United States*, 349 U.S. 190. For a full discussion of the issue, see Brief for Petitioners, p. 14, and Reply Brief for Petitioners, pp. 2-4, in *Albertson and Proctor* v. *S.A.C.B.*, Nos. 17,492 and 17,623, awaiting decision of this Court.

(c) Contrary to the government's argument, section 4(f) does not bar all evidentiary use of the registration documents in criminal proceedings against the person who executes them. It merely bars such use "in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute." By its terms, the provision is not applicable to prosecutions for violations of sections of the Act other than sections 4(a) and 4(c). This construction is confirmed by the legislative history of section 4(f). See Petitioners' Supplemental Memorandum on Legislative History Relating to Scope of Section 4(f), filed in *Albertson & Proctor* v. *S.A.C.B.*, Nos. 17,492 and 17,623 in this Court.[4] Hence there is nothing to bar the introduction in evidence of the fact of an officer's execution of the registration documents so as to prove his membership in the Communist Party in prosecutions of him under sec-

[4] For our showing that section 4(f) does not bar evidentiary use of the *contents* of the registration documents against the signer, see our Brief, pp. 20-21.

tion 15(c) of the Act, 50 U.S.C. 794(c), for violations of the employment, passport or labelling provisions of sections 5, 6 and 10, 50 U.S.C. 784, 785 and 789.

3. The government complains (Pet. 7-10) of the holding by the panel that the prosecution had the burden of proving that "a willing volunteer" was available to execute the registration documents. It says (Pet. 8) that the panel "indulged in a presumption—*i.e.* that there is no one willing to make known in any public fashion any kind of association with the Party." And it asserts (*ibid.*) that this presumption is "contrary to what is common knowledge."

This argument rests on a false premise. The panel indulged in no presumption, let alone the one ascribed to it by the government. What the panel did was to *refuse* to indulge in a presumption. And what it refused to presume was not the existence of a person willing to reveal "any kind of association" with appellant, but rather the existence of a person *willing to sign and submit the registration documents as the authorized agent of appellant* (Op. 11).

In holding that it would not presume the existence of a "willing volunteer," and that the government had the burden of proof on this issue, the panel was simply refusing to assume an unlikely eventuality and safeguarding the presumption of innocence (Op. 11-12).[5] Moreover, in view of the fact that willfulness is an element of the offense of refusing to register (Op. 13, n. 16), the panel's ruling was also required by *Heikkinen* v. *United States*, 355 U.S. 273, discussed by the panel at Op. 13. *Heikkinen* holds that where performance of a statutory duty by an accused requires the cooperation of some other person or agency, the

[5] The government's claim from what it says is "common knowledge" that a willing volunteer was readily available to appellant contradicts its initial assertion (Pet. 1) that, "The present decision seriously impairs the enforcibility [*sic*] of the disclosure provisions and seriously limits the effectiveness of the statute."

government has the burden of proving that the other person or agency was willing to cooperate before the accused can be found guilty of a willful default. Here, since the registration of appellant required the cooperation of a "willing volunteer," the government has the burden of proving there was such a person.[6]

The government argues (Pet. 8-10) that it should not be required to prove the availability of a "willing volunteer" because it is "common knowledge" that some persons are willing to admit publicly on some occasions that they have some form of association with appellant or Communism. The argument is a non-sequitur, and the newspaper stories cited to support its premise are irrelevant. It is one thing for a person to be wiling to run for public office on the Communist ticket or to appear before college audiences as spokesman for the Communist point of view. It is something altogether different to volunteer to execute the registration documents. Whoever does so must certify that he is the Party's authorized agent for the purpose of making the admissions and submitting the information called for by the documents (J.A. 58, 63). This action evidences a far more "'intimate knowledge of [the Party's] workings'" (Op. 11) than is implied by any conduct reported in the press clippings to which the government refers. The signer can certify to his authority only if he knows enough about appellant's internal affairs

---

[6] Citing *Communist Party* v. *Catherwood*, 367 U.S. 389, the government argues (Pet. 10) that it would be "anomalous" to permit appellant to "maintain its registration" under the New York Unemployment Insurance Law while holding that the privilege of appellant's officers precludes enforcement of the Act's registration requirement. This situation presents no anomaly. "Registration" under the New York Law involves no action of any kind by appellant or its officers and hence entails no self-incrimination. "Registration" under that law is effected simply by the act of the Industrial Commission in assigning a "registration number" to an employer for accounting purposes. See 1960-61 Handbook for Employers, New York Department of Labor, Division of Employment, p. 20, and Brief for Petitioner in *Communist Party* v. *Catherwood*, Supreme Court, No. 495, October Term, 1960, p. 15.

to be confident that the persons who instructed him had appellant's authority to do so.

Furthermore, the contents of the registration documents could be introduced in evidence in a prosecution of the signer for violation of the Smith Act or section 4(a) of the Act to prove any incriminating facts contained therein other than the fact of his membership or officership in appellant. See our Brief, pp. 20-21. Finally, any person who signed the registration documents would incur the very substantial risk of criminal prosecution under section 15(b) for complicity in any false statements and omissions.

For all of these reasons, there is nothing in the government's appeal to a synthetic "common knowledge" which can change the panel's refusal to presume the availability of a "willing volunteer" and its ruling that the government has the burden to prove that such a person was available.[7]

4. It would be pointless for the full Court to review the panel decision on the complicated questions which the privilege issue raises, including the issue on which appellant has petitioned for a rehearing by the panel. In the course of this litigation, appellant has twice asked for and twice obtained Supreme Court review of decisions by panels of this Court. If there is any substance in the government's arguments, it should have no difficulty in obtaining certiorari and a decision by the only tribunal which can rule with finality.

---

[7] The government does not claim that an officer who acknowledged his position before a public audience would thereby waive his privilege not to sign the registration documents. It could make no such claim in view of the established rule that the making of incriminating admissions extra-judicially, or in another proceeding, or even at a different stage of the same proceeding, does not waive the maker's privilege if he chooses to assert it thereafter. See authorities cited in our Reply Brief, p. 4. In any event, there is no evidence in the record that an officer of appellant has made any public admisison of his officership.

Moreover, if the full Court were to grant rehearing and sustain the government's contentions on the privilege issue, that would not dispose of the case. It would merely require the Court to consider the numerous other questions which this appeal presented but which the panel was not required to reach because of its disposition of the case. These questions are argued in sections II through IX of our brief. As even a cursory reading will disclose, they involve novel and difficult issues of constitutionality and statutory construction. They are of Supreme Court dimension, and if they must be reached, they will never be settled short of that Court.

Respectfully submitted,

JOHN J. ABT
320 Broadway,
New York 7, N. Y.

JOSEPH FORER
711 14th St., N.W.,
Washington 5, D.C.

Attorneys for Appellant

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 21 1964

Harold J. Paulson
CLERK

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17583

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, APPELLANT

v.

THE UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEE'S PETITION FOR RE-HEARING EN BANC

The Appellee, the United States of America, hereby petitions this Court to permit a rehearing before the Court *en banc* to review its judgment, entered on December 17, 1963, reversing by the unanimous vote of a panel the judgment of conviction against the appellant, the Communist Party of the United States, for failure to comply with an order of the Subversive Activities Control Board that appellant register and file a registration statement with the Attorney General pursuant to the provisions of Secion 7 and Section 15 of the Subversive Activities Control Act, 50 U.S.C. Sec. 781, *et seq.*

In support of this petition the following is respectfully submitted:

(1) The Subversive Activities Control Act was enacted by Congress to deal with the international Communist movement in its domestic form. The registration and disclosure provisions are basic to the administration of the Act. The present decision seriously impairs the enforcibility of the disclosure provisions and seriously limits the effectiveness of the statute.

718-710—64——1

(2) The December 17, 1963 opinion is in conflict with the previous holding of another panel of this Court which upheld the constitutionality of these very provisions of the Act, *Communist Party* v. *Subversive Activities Control Board*, 96 U.S. App. D.C. 66, 223 F (2d) 531, (1954). This conflict stems from the present holding that the privilege against self-incrimination is available to the Party's officers even when acting in their representative capacities and is a legal justification for the organization's failure to register. The previous panel, relying on the holdings of the Supreme Court in *Wilson* v. *United States*, 221 U.S. 361 and *United States* v. *White*, 322 U.S. 694, concluded that the privilege of self-incrimination was not a bar to the Party's obligation to register. This holding was consistent with the expressed rationale underlying the *Wilson* and *White* decisions and enunciated by the Supreme Court in the latter decision as follows:

> Individuals when acting as representatives of a collective group cannot be said to be exercising their personal rights and duties, nor to be entitled to their purely personal privileges. Rather, they assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers, and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. (322 U.S. at 699.)

The present decision also considers the doctrines of *Wilson* and *White* but holds, contrary to the earlier decision, that they do not apply. The decision of December 17, 1963 distinguishes those cases, stating: "*Wilson* and *White* furnish no authority for compelling an officer to identify himself as such, where, as here, such identification, without more incriminates him." (Slip opinion, p. 8). In other words, the Court holds that *Wilson* and *White* apply *only* when the representative duties are in themselves not incriminating.[1]

---

[1] The decision cites as authority for so holding *Curcio* v. *United States*, 354 U.S. 118 and *Russell* v. *United States*, 306 F (2d) 402 (C.A. 9). But, *Russell* involved the required registration of an individual, not of an unincorporated association. And, the issue in *Curcio* was not whether or not

This distinction is in conflict with the doctrine expressed by *Wilson* and *White* and finds no support in the factual situations there presented. In each case, the mere appearance and identification of the individual was incriminating. In *Wilson* the record established that the grand jury was investigating alleged criminal activity of Wilson and, prior to the subpoena, had returned indictments charging Wilson and other officers of a corporation with fraudulent use of the mails and a conspiracy for such use. The indictment related that the device employed to perpetuate the fraud was the corporate entity, the United Wireless Telegraph Company. Wilson, the president of the corporation, appeared pursuant to a subpoena addressed only to the corporation. Thus, response to the subpoena provided evidence of the officer's official connection with a fraudulent corporation. (Record, Supreme Court, Oct. term 1910, N. 760, p. 6, 10–16). In *White*, the required response to the subpoena directed solely to the Union provided evidence of White's association with a union then under investigation for alleged criminal activity. (Record, Supreme Court, October term 1943, No. 336, pp. 3–4.)

---

an officer must, in his official capacity, satisfy the organization's obligations. The objection was that the questions asked (such as, "Where are any of those records today?") called, not for representative response, but rather required the witness "to disclose the contents of his own mind." (354 U.S. at 128.) *Curcio* did not hold that the Union was excused from complying with the subpoena because its officers, in responding, would be identifying themselves, even though the Union to which the subpoena was directed was allegedly one of the racketeer-controlled "phantom unions" which the grand jury was investigating. The Court also cites *Curcio* as authority for the statement that the doctrine of *United States* v. *Austin Bagley*, 31 F(2d) 229 is "sharply limited to information which creates no danger of incrimination." (Slip opinion, p. 9.) But we submit, that is not what *Curcio* says. The Court in *Curcio* said, "requiring the custodian to identify or authenticate the documents for admission in evidence merely makes explicit what is implicit in the document itself. *The Custodian is subjected to little, if any, further danger of incrimination.*" (354 U.S. at 125, emphasis supplied.) In *Austin Bagley*, the second circuit said that "since production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine * * * testimony auxiliary to the production is as unprivileged as are the documents themselves. By accepting the office of custodian the holder not only exposes himself to producing the documents, but to making their use possible, without requiring other proof than his own." (31 F(2d) at 234). *Curcio* left this rule undisturbed.

The present decision is also in conflict with the Supreme Court's decision in *Baltimore and Ohio R.R.* v. *I.C.C.*, 221 U.S. 612. In *Baltimore and Ohio* the Court had before it an I.C.C. order that certain carriers make monthly reports, under oath, showing instances where employees had been on duty for longer than 16 hours. At the time, the law provided that "it shall be unlawful for any common carrier, its officers or agents" to allow employees to work longer than 16 hours, 221 U.S. at 614, note 1. In answer to the contention that compelling disclosure by the required reports would violate the Fifth Amendment rights of the carriers' officers, the Court stated (221 U.S. at 622–623):

> With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation. But the transactions to which the required reports relate are corporate transactions subject to the regulating power of Congress. And, with regard to the keeping of suitable records of corporate administration, *and the making of reports of corporate action*, where these are ordered by the Commission under the authority of Congress, the officers of the corporation, by virtue of the assumption of their duties as such, are bound by the corporate obligation and cannot claim a personal privilege in hostility to the requirement. *Wilson* v. *United States, supra*, (emphasis supplied).

In short, we submit that, as the prior decision of this Court held, the doctrine expressed in *Wilson, White* and *Baltimore and Ohio R.R.*—that individuals who choose to serve in a representative capacity assume the obligations of the entity they serve and when acting in their official capacity have no privilege against self-incrimination—controls the case at bar. In refusing to apply this doctrine to the Communist Party, the present decision conflicts both with decisions of the Supreme Court and with the prior panel's holding. This conflict is most appropriately resolved by an *en banc* hearing.

(3) In any event, even if we assume, *arguendo*, that *Wilson*, *White* and *Baltimore and Ohio R.R.* are not applicable and that the officers of the Communist Party do, in fact, have recourse to the personal privilege in the circumstances of this case, the panel's decision would merit review by the Court *en banc*. This is so because the December 17, 1963 decision, even granting such assumptions, fails to take into consideration factual matters of which this Court should have taken judicial notice. For, assuming the officer's privilege, for a reversal of the conviction on that basis, it must also follow that each officer of the Party[2] would, in fact, face a real danger of self-incrimination by effecting the registration, *Rogers* v. *United States*, 340 U.S. 367 at 372–3. If each and every officer would not face that danger, the Party's refusal to register cannot be excused. The December 17, 1963 opinion of the panel assumes that every officer or other representative of the Party faces such a danger. But such assumption is opposed to facts that are a matter of common knowledge.

We first emphasize that the registration process is a two step procedure involving separate penalties. These steps are (1) the filing of a registration form IS–51A and (2) the filing of certain information on the registration statement, form IS–51. The first eleven counts of the twelve count indictment in this case relate only to the failure to file registration form, IS–51A. All that is required by this form is a statement that the Communist Party is registering as a communist-action organization and the signature of the officer of the Party or the authorized agent executing the form. It is only the twelfth count of the indictment which relates to the second step, the filing of the registration statement, form IS–51, and it is only this form which asks for additional information.

We also emphasize that being a member or officer of the Communist Party is not, by itself, criminal. The Smith Act, 18 U.S.C. 2385,[3] does not make Party position or membership,

---

[2] And, as discussed below, each employee, attorney or other agent.

[3] Not only is mere holding of office or membership in the Party not a violation of the Smith Act, the present statute expressly provides that mere membership or officership shall not constitute per se a violation of any crimi-

without more, illegal. On page 7 of the Slip opinion, in pointing to the "legislative array" against the Communist Party, the Court properly notes that in a Smith Act membership case it must be shown that the organization advocates the overthrow of the Government by force or violence, citing *Noto* v. *United States*, 367 U.S. 290 (1961). But the December 17, 1963 opinion goes on to say that "with respect to the Communist Party, Congress has supplied the showing," citing sections 2 and 3 of the Communist Control Act [4] of 1954. But if Sections 2 and 3 had such legal effect the *Noto* case would not have been reversed by the Supreme Court on the same day that it found the evidence in *Scales* v. *United States*, 367 U.S. 203, to be sufficient on the question of the sufficiency of the proof as to the element of the organization's teaching the overthrow of the Government by force or violence.

Thus, the execution of the registration form could be incriminating only if (1) the fact of registration could be used as evidence against an individual, or (2) the act of registration could constitute a lead to other evidence which could be so used, *Rogers*, *supra*, 340 U.S. at 372–373; *Blau* v. *United States*, 340 U.S. 159 at 161. As the panel recognized, Section 4(f) of the Act prevents the first of these results, 50 U.S.C. 783(f), (slip opinion, p. 10, n. 10). Thus, the court's presumption that each and every officer would incriminate himself by exe-

---

nal statute, Section 4(f), 50 U.S.C. 783(f). As the Chief Judge pointed out in a separate opinion in another case decided on December 17, 1963: "Congress chose not to outlaw the Communist Party or to prohibit all its activities.", *American Committee* v. *S.A.C.B.*, —— F.(2d) ——, Slip opinion, p. 17 (dissenting opinion).

[4] Section 2 of the Communist Control Act of 1954 is simply a legislative finding of fact and, as such, may be used solely for supporting the constitutionality of the substantive provisions of the Act.

Section 3 of the Communist Control Act of 1954 states that the Communist Party of the United States is not entitled to any of the rights, privileges, and immunities attendant on legal bodies created under the jurisdiction of the laws of the United States or any particular subdivisions thereunder, 50 U.S.C. 842. In the only federal court decision in which an interpretation of this section has been involved, the Supreme Court held that the State of New York was unjustified in relying on this section when it disqualified the Communist Party and its employees from participation in the New York State unemployment program. *Communist Party* v. *Martin Catherwood*, 367 U.S. 389.

cuting the registration form narrows itself to the proposition that by so doing each individual officer would provide a lead to other evidence. But it is incredible that Gus Hall, for example, could not sign a registration form for the organization without furnishing a "lead" to incriminating evidence. The Party's high ranking officers have not in the past sought to conceal their identification with the Party—as was noted by the Supreme Court in the *Communist Party* case, 367 U.S. 1, at 107. The execution of a registration statement by Gus Hall (whose leadership in the Party has been well known to the Government and the public for over a decade) would, under such circumstances, only "further . . . evidence a fact, which traditionally, has been one of public notice." *Id.*, at 107. See *ante*, p. 8 and Appendix A.

As we have seen, there are two steps in the registration process which *could* be incriminating. The first of these is the execution of the registration form itself which, as we have seen, would not be incriminating *per se* to every officer of the Communist Party. The second possibility would be incrimination from providing the information required by the registration statement, form IS–51. But, as the earlier decision of another panel of this Court pointed out, all that is required by the statement is reproductions of or extracts from organizational records, *Communist Party* v. *S.A.C.B.*, 223 F(2d) at 547. If, as the December 17, 1963 decision holds, the production of such records can be compelled, certainly reproductions or extracts of these records can be similarly compelled. Moreover, if any of the information required cannot be provided from the Party's records, this would not excuse the failure to file the form itself for the proper place to raise such a claim would be on the form. *United States* v. *Sullivan*, 274 U.S. 259.

(4) The December 17, 1963 opinion of the Court recognizes that in the usual situation a corporation or an organization which is under a legal obligation to perform an affirmative act also has the affirmative obligation to secure someone who is in a position to act in its behalf in performance of its duty. (Slip opinion, p. 11). But, the Court holds that the government had the duty to prove that a "willing volunteer" was available. The Court arrives at this conclusion by refusing to presume,

as other cases do, (see Slip Opinion, p. 11) that an organization can always find someone willing to act for it because "we cannot assume without proof that anyone is willing to submit data the possession of which implies an intimate knowledge of [the Party's] workings." (Slip opinion, p. 11.)[6] In refusing thus to apply the usual rules relating to performance of an organization's legal obligations, the panel again indulged in a presumption—*i.e.* that there is no one willing to make known in any public fashion any kind of association with the Party. This, however, is contrary to what is common knowledge.

It is a matter of common knowledge that the Party is represented publicly by its officers and spokesmen for any purpose deemed by the Party to be beneficial to it. On several occasions even in recent weeks Gus Hall has been quoted and identified in the public press as a leading spokesman of the Communist Party. See, for example, *New York Times*, December 18, 1963, p. 21.

During the past two years or so it has been widely publicized that the Communist Party has been engaged in extensive efforts to have its spokesmen invited to speak before various groups, particularly before groups of college students. On occasion this had led to some public controversy as to the propriety of colleges affording a forum to such leaders. But our point is that when the many colleges have permitted these leaders to speak, their appearances have been publicized in the public press. Indeed, the Party's whole purpose in conducting such a propaganda effort would be defeated if the speaker did not permit himself to be publicly identified as an officer or spokesman of the Party. We do not think the Court should indulge in a presumption that runs contrary to generally known fact.

Without endeavoring to be exhaustive, we have attached as Appendix B to this petition a listing of newspaper articles during 1961–1963 which reported appearances by various Communist Party leaders before particular college groups, with

[6] We fail to see how a representative or attorney by the simple filing of the required forms and certifying that he has been so authorized, intimates he has an intimate knowledge of the Party's workings.

an indication of how the leader was identified in the article.

As an additional example of this type of open and voluntary personal identification, we have submitted to the clerk 10 copies of the magazine "Political Affairs" for March 1962, which publication the record before the Subversive Activities Control Board in the *Communist Party* case established is a monthly magazine published by the Communist Party, a fact acknowledged by the publication's masthead, which states: "Theoretical Organ of the Communist Party, U.S.A." The masthead also sets forth that Herbert Aptheker is the editor. The record in the same case before the Subversive Activities Control Board also established that the Party publishes a newspaper, "The Worker." We have also submitted copies of the December 22, 1963 edition of that paper, which contains an article concerning Gus Hall's reaction, as a spokesman for the Communist Party, to this Court's reversal of the Party's conviction.*

No point is to be served here by a lengthy recital of the many, many instances of public identification set forth in the Appendix. These are all facts which are in the public domain and are matters of public knowledge and facts of which the court can take notice, *Jacobson* v. *Massachusetts*, 197 U.S. 11, 30; *Gay's Gold*, 13 Wall 358, 362; *United States* v. *A. H. Fisher Lumber Co.*, 162 F(2d) 872, 873 (C.A. 4); *New York Indians* v. *United States*, 170 U.S. 1, 32.

---

*In addition, a wire service story carried in the public press in January, 1964, reported that Arnold Johnson, public relations director of the Community Party, had announced he had written to the Attorneys General and Secretaries of State of the 50 states requesting information relative to placing Communist candidates on the ballot in each state. (A spot check by us of three States, reveals that such letters, on the letterhead of the Communist Party, U.S.A., have in fact been received by the States of Maryland and New Jersey.) Thus, while the Party argues to this Court that none of its officers or members could dare identify himself in association with it on a registration form, the Party is preparing to have some of its members run for public office as Communist candidates. See, for example, *New York Times*, January 11, 1964, p. 24; *The Washington Star*, January 11, 1964, p. B-8; *The Washington Post*, January 10, 1964, p. 1; *The Idaho Daily Statesman*, January 10, 1964, p. 10.

718-710—64——8

In view of these well known circumstances, we respectfully submit that the December 17, 1963 opinion is in error in its holding that the Government had the burden of proving at the criminal trial that there was someone available whom the Party could have prevailed upon to represent it in filing the registration and registration statement, had the Party for an instant decided to perform its legal duty. The simple fact is that had the Party acted in any good faith, it could have secured any number of its officers, members, employees—or its attorneys—to act in such capacity without risking any additional incrimination.

It certainly would be an anomalous situation if the Party were permitted to skirt its obligations to register under the Subversive Activities Control Act on the theory that it cannot reasonably prevail on anyone to represent it for the purpose of effecting such registration, while it has just recently (in June 1961) prevailed in the Supreme Court in having set aside the action of the New York State Industrial Commissioner terminating the Communist Party's registration and liability to State taxation as an employer under the New York State unemployment insurance law. See, *Communist Party, U.S.A.* v. *Martin Catherwood*, 367 U.S. 389. The *Catherwood* case is an apt illustration of the disingenuousness of the Party's position here. In *Catherwood* the Party complained that it should be permitted to maintain its registration so that its employees would be eligible under the unemployment insurance laws. Here, when the registration is detrimental to the Party's interests it urges that its members and employees cannot possibly be disclosed, or disclose themselves as such, for fear of incrimination.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court order a rehearing *en banc*.

J. WALTER YEAGLEY,
Assistant Attorney General.

KEVIN T. MARONEY,
GEORGE B. SEARLS,
ROBERT L. KEUCH,
Attorneys,
Department of Justice,
Attorneys for Appellee.

CERTIFICATE OF GOOD FAITH

It is hereby certified that this Petition for Rehearing is presented in good faith and not for delay.

(S) KEVIN T. MARONEY,
Attorney for Appellee.

APPENDIX A

(The following is a compilation of a few examples of the constant public identification made of the Communist Party's officers, members or representatives during the period January 1961 to the present. This compilation is taken from public sources only, such as newspaper accounts or radio and television broadcasts. It is by no means exhaustive.)

The final home edition of the January 24, 1962 issue of the *San Francisco Chronicle* quoted Gus Hall as having stated on the previous day that he is "an authoritative spokesman for the communists of America." The final edition of the *San Francisco Examiner* for January 24, 1962 also quoted Hall as having identified himself as an "authoritative spokesman" for the Communist Party.

The February 13, 1962 edition of *The Oregonian*, Portland, Oregon, reported on a press conference held by Gus Hall on February 12, 1962, at which conference Hall admitted being a "spokesman" for the Communist Party.

The February 19, 1962 edition of *The Quest*, a student weekly publication of Reed College, Portland, Oregon, reported on Gus Hall's appearance on the Reed campus on February 14, 1962, stating that Hall was introduced as the authoritative spokesman of the American Communist Party.

The February 25, 1962 edition of *The Worker* contains an article reporting that Hall spoke at Stanford University, Palo Alto, California, on February 15, 1962. Hall was identified in this article as a "communist spokesman." The *Daily Palo Alto Times*, Palo Alto, California, edition of February 16, 1962 also reported on Hall's speech at Stanford University on February 15, 1962, where he reportedly described himself as a self-styled "authoritative spokesman" for the American Communist Party. The article points out that he spent nearly half of his one hour address stating why he had not registered as a Communist Party member.

On May 6, 1962, in a filmed interview telecast on CBS–TV, Chicago, Illinois at 10:00 p.m., Gus Hall stated that he was employed by the Communist Party.

An article in *The Daily Cardinal,* University of Wisconsin, Madison, Wisconsin, edition of May 8, 1962, states that Hall spoke at the Union Theater on May 7, 1962 on the subject "The Communist Viewpoint". An article appearing in *The Wisconsin State Journal,* Madison, Wisconsin, of May 8, 1962, states that Hall stated that he was there to give them the Communist slant on things from a Communist's viewpoint. The May 8, 1962 issue of *The Milwaukee Sentinel,* Milwaukee, Wisconsin, contains an article reporting Hall's appearance at a news conference preceding his address. The article states that Hall indicated that he was anxious to meet the press because he must continually deny that he or his Party has gone underground. Hall further stated that the Communist Party is doing very well with about ten thousand members and that there had been an increase in the membership in the past two years of about two hundred.

The July 17, 1961 issue of the *Seattle Times,* page 5, columns 2–3, contained an article entitled "Hall, Top Red, Says He will Defy Supreme Court."

On February 17, 1962 Benjamin Davis stated on a radio program broadcast over Radio Station WAVI, Dayton, Ohio, "I'm very proud to be a Communist". The February 25, 1962 issue of *The Worker* reported this broadcast and referred to Davis as a spokesman for the Communist Party.

The March 14, 1961 edition of the *New York Times* carried an article that Elizabeth Gurley Flynn had been elected National Chairman of the Communist Party. The article indicated that at a press conference at an office described as the office of *The Worker,* Communist weekly publication, Flynn stated she was the newly elected Chairman of the Communist Party, that she had been a Party member since 1926 and that her selection was a triumph for the women of the Party.

The issue of June 20, 1961 of "The Chicago American", Diamond Final Edition, page five, column four, carried an article entitled "Commie Boss Lightfoot Vows Court Fight—

1,000 Reds Left in Illinois." This article carried the byline of the "Chicago American" reporter Sam Blair and reflects an interview of Lightfoot by Blair. The article noted that the statements made by Lightfoot to Sam Blair were made in the eighth floor offices of the Illinois Communist Party at 36 West Randolph Street, Chicago, Illinois. This article reflected that Lightfoot had stated to Blair that the members of the Communist Party in Illinois had shrunk from a peak membership of eight thousand in the late 1930's to about one thousand at the present time. This article refers to Claude Lightfoot as a "communist leader" both directly and indirectly. The article also contains a photograph of Claude Lightfoot.

The "Hyde Park Herald" issue of July 26, 1961, a Chicago local area newspaper, carried a one page open letter "To the American People". This letter was in the nature of a paid advertisement and the letter was signed by Claude Lightfoot, Vice Chairman of the Communist Party, USA.

On November 18, 1961, Lightfoot appeared as a guest on the Chicago CBS Television program "Insight" which program was televised over WBBM, CBS–TV at 3:00 P.M. He was introduced as a former Vice Chairman of the Communist Party. During the interview he stated that he was a member of the Communist Party, that he has spent 31 years in the Party and that he was an "executive of the organization."

During 1961 and 1962, Dorothy Healy made periodic appearances on a program entitled "Open Platform" which is broadcast over Radio Station KPFK, Los Angeles, California. The dates of her appearances were as follows:

March 3, 1961
March 31, 1961
July 7, 1961
July 21, 1961
October 11, 1961
October 25, 1961
November 22, 1961
December 6, 1961
December 20, 1961
January 3, 1962
October 10, 1962

During these appearances, Healey was introduced as "chairman of the Communist Party in Southern California" or as "local spokesman for the Communist Party in Southern California."

In the September 18, 1961 issue of "The Spokesman Review", a local daily newspaper published in Spokane, Washington, there appeared an article on page 4, column 3, which sets forth a letter to this newspaper by Burt Nelson wherein Burt Nelson identified himself as the "Chairman of the Communist Party of Washington." The first paragraph of this letter states the following:

> A recent statement by Gus Hall, General Secretary of the Communist Party of the United States, discusses questions prompted by the emergence, in our country, of an ultra-right political movement. In this state we are mailing it extensively to those who are actively interested in constitutional liberties, labor, peace, education and public affairs generally.

In the Sunset edition of "The Seattle Daily Times," dated December 1, 1961, a local Seattle, Washington newspaper, there appears an article on page 1, column 1, entitled, "Communist: Burt Nelson Won't Register or 'Disappear'." In this article it is stated that Burt Nelson said, today, he preferred to be identified as a Communist "spokesman" although he was introduced at a recent press conference as the "State Chairman of the Communist Party." This article continued that he (Nelson) implied that the switch in identification was connected with the registration deadline and the penalties provided for not registering. This article also states that Nelson said there were about 500 "party" members in Washington State and that Nelson contended the "party" in Washington has gained in membership in the past five to ten years but considered that it has lost strength and influence.

On December 19, 1961, Burt Nelson was interviewed on Television Station KOMO of Seattle. In this interview, Burt Nelson identified himself as a "spokesman" for the Communist Party, stated that he was a member of the Communist Party for about 20 years.

On December 19, 1961, Burt Nelson was interviewed by Television Station KOMO, Seattle, in connection with a daily program called "Gateway," which interview was broadcast on December 20, 1961. In this interview, Nelson was

asked if he were a Communist, and he stated that he was and added that he had been a member of the Communist Party for about 20 years.

A taped interview with Albert Lima was broadcast over Radio Station KGO, San Francisco, California on November 17, 1961. During this interview Lima stated that he was listed as the Chairman of the Northern California District of the Communist Party.

Lima appeared in a filmed interview broadcast on Station KGO–TV on November 20, 1961. During the interview, Lima stated that he was Chairman of the Northern California District of the Communist Party.

A taped interview with Lima was broadcast over Radio Station KCBS, San Francisco on November 21, 1961. Lima stated he was the leader of the Communist Party in Northern California. Similar interviews were broadcast on Radio Station KCBS, San Francisco, on November 30, 1961 and on Station KKHI, San Francisco on November 29, 1961.

"The Beloit Daily News," a Beloit, Wisconsin, daily newspaper of July 24, 1961, carried an advertisement captioned "An Open Letter to the American People," dealing with the U.S. Supreme Court decision against the Communist Party. At the top of the advertisement, the following appeared: "This statement is made available through voluntary contributions from citizens of diverse political views and affiliations in the interest of public information and constitutional liberties. Fred B. Blair—3236 North 15th Street—Milwaukee 6, Wisconsin." At the end of the advertisement, the following appeared: "National Committee, Communist Party, USA, 23 West 26th Street, New York 10, New York, Gus Hall, General Secretary."

APPENDIX B

(Set forth below is a partial listing of newspaper accounts containing references to Communist Party leaders or spokesmen concerning their appearances at various colleges. The individual's connection with the Communist Party is also set forth as reflected in the news article.)

Gus Hall

Newspaper Or College Publication	College Or University	Manner In Which Identified
Richmond, Virginia, "Times Dispatch," January 31, 1962.	University of Virginia	"Secretary of the American Communist Party."
Charlottesville, Virginia, "Daily Progress," January 31, 1962.	University of Virginia	"United States Communist Party Secretary."
Yale University, "Daily News," February 11, 1962.	Yale University	"General Secretary of the Communist Party, USA."
Hartford, Connecticut, "Times," February 14, 1962.	Yale University	"General Secretary of the Communist Party in the United States."
Philadelphia, Pennsylvania, "Inquirer," October 12, 1962.	Philadelphia Social Science Forum.	"One of the Nation's Top Communists."
Seattle, Washington, "Time-Intelligencer," February 2, 1962.	University of Washington.	"Communist Leader."
Seattle, Washington, "Times," February 10, 1962.	University of Washington.	"General Secretary of the Communist Party in the United States."
Seattle, Washington, "Times," February 20, 1962.	University of Washington.	"National Communist Leader."
New York, "Daily News," May 3, 1962.	Hunter College	"Communist Official."
Chicago, Illinois, "American," May 5, 1962.	University of Chicago.	"The Nation's Leading Communist."
Chicago, Illinois, "Daily News," May 5, 1962.	University of Chicago.	"General Secretary of the Communist Party in the United States."
Milwaukee, Wisconsin, "Sentinel" May 5, 1962.	University of Wisconsin.	"General Secretary of the American Communist Party."
New York, "Herald-Tribune," October 20, 1962.	Fairleigh Dickinson University.	"Chairman of the American Communist Party."
Wisconsin "State Journal," May 8, 1962.	University of Wisconsin.	"The Top Communist in the United States."
"Daily Cardinal," May 8, 1962	University of Wisconsin.	"General Secretary of the Communist Party of America."
Boston, Massachusetts, "Globe," March 12, 1963.	Brandeis University	"General Secretary of the American Communist Party."
Washington, D.C., "Evening Star," February 14, 1963.	Yale University	"Comunist Leader."
"Yale Daily News," February 14, 1963.	Yale University	"American Communist Party Boss" and "America's Top Communist."
Philadelphia, Pennsylvania, "Inquirer," April 30, 1963.	Swarthmore College	"General Secretary of the Communist Party, USA."
Palo Alto, California, "Daily Times," February 16, 1962.	Stanford University	"Authoritative Spokesman for the American Communist Party."
San Francisco California, "Examiner," February 16, 1962.	Stanford University	"Executive Secretary of the National Communist Party."
San Francisco, California, News-Call-Bulletin," January 25, 1962.	University of California	"United States Communist Boss."

James Edward Jackson, Jr.

Newspaper Or College Publication	College Or University	Manner In Which Identified
Waterville, Maine, "Morning Sentinel," May 19, 1962.	Colby College	"Editor of 'The Worker,' the Communist Party Paper in the United States."

Anthony Krchmarek

Newspaper Or College Publication	College Or University	Manner In Which Identified
"The Record," March 10, 1961	Antioch College	"Ohio Communist Party Chairman."

Samuel Kushner

Newspaper Or College Publication	College Or University	Manner In Which Identified
"North Central Chronicle," May 12, 1961.	North Central College of Illinois.	"Vice Chairman of the Communist Party of Illinois."

Elizabeth Gurley Flynn

Newspaper Or College Publication	College Or University	Manner In Which Identified
Rockford, Illinois, "Morning Star," November 9, 1962.	Northern Illinois University.	"A Spokesman of the Communist Party".

Robert Thompson

Newspaper Or College Publication	College Or University	Manner In Which Identified
Detroit, Michigan, "Free Press," May 17, 1962.	Michigan State University.	"A Member of the Communist Party."

Hyman Lumber

Newspaper Or College Publication	College Or University	Manner In Which Identified
"The Muhlenberg Weekly," October 10, 1963.	Muhlenberg College	"A Leading Communist Spokesman."
Allentown, Pennsylvania, "Evening Chronicle," October 10, 1963.	Muhlenberg College	"Official Representative of the United States Communist Party."

Mortimer Daniel Rubin

Newspaper Or College Publication	College Or University	Manner In Which Identified
Greeley, Colorado, "Daily Tribune," April 9, 1963.	Colorado State College.	"United States Communist Party Spokesman."
"The Minnesota Daily," November 9, 1962.	University of Minnesota.	"A Prominent Communist."
Minneapolis, Minnesota, "Star," November 29, 1962.	University of Minnesota.	"A Communist Editor."
"The Daily Iowan," December 4, 1962.	The State University of Iowa.	"A Communist Editor."
Columbus, Ohio, "Evening Dispatch," October 31, 1961.	Ohio State University.	"One of the Two Most Promising and Active Communists."

Arnold Johnson

Newspaper Or College Publication	College Or University	Manner In Which Identified
Cambridge, Ohio, "Daily Jeffersonian," January 5, 1963.	Muskingum College..	"A Widely Known American Communist."
Zanesville, Ohio, "Times Recorder," January 10, 1963.	Muskingum College..	"Public Information Director of the Communist Party, USA."
"The Trinity Tripod," December 7, 1962.	Trinity College.....	"United States Communist."
Hartford, Connecticut, "Hartford Times," December 5, 1962.	Trinity College.....	"American Communist Party Official."
Utica, New York, "Observer-Dispatch," April 19, 1962.	Hamilton College.....	"A Veteran Communist."

Albert J. Lima

Newspaper Or College Publication	College Or University	Manner In Which Identified
San Francisco, California, "Examiner," July 28, 1963.	University of California.	"Northern California Chairman of the Communist Party."
San Francisco, California, "Examiner," October 9, 1963.	Marin College.....	"A Communist Party Leader."
San Rafael, California, "Independent Journal," October 9, 1963.	Marin College.....	"Northern California District Chairman of the Communist Party."
"The Stanford Daily," April 5, 1962..	Stanford University..	"Head of the Communist Party in Northern California."

Dorothy Healey

Newspaper Or College Publication	College Or University	Manner In Which Identified
Santa Monica, California, "Evening Outlook," October 5, 1963.	University of California at Los Angeles.	"Secretary of the Communist Party in Southern California."
Los Angeles, California, "Times," October 17, 1963.	The California Institute of Technology.	"Chairman of the Communist Party in Southern California."
Riverside, California, "Daily Enterprise," November 13, 1962.	The University of California at Riverside.	"Chairman of the Communist Party of Southern California."
Los Angeles, California, "Times," September 27, 1962.	The University of California at Riverside.	"Secretary of the Communist Party in Los Angeles."
Clovis, New Mexico, "News Journal," April 8, 1962.	Eastern New Mexico University.	"Chairman of the Communist Party in Southern California."

Carl Winter

Newspaper Or College Publication	College Or University	Manner In Which Identified
"The Daily Collegian," January 18, 1963.	Wayne State University.	"Midwest Correspondent of 'The Worker,' a Communist Party Newspaper."
"The Kalamazoo College Index," December 7, 1962.	Kalamazoo College	"Michigan Chairman of the Communist Party."
"The Michigan Daily," May 17, 1963.	University of Michigan.	"Head of the Communist Party in Michigan."
Ann Arbor, Michigan, "News," April 20, 1963.	University of Michigan.	"American Communist."

Herbert Eugene Aptheker

Newspaper Or College Publication	College Or University	Manner In Which Identified
San Francisco, California, "Examiner," February 23, 1963.	San Francisco State College.	"A Top United States Communist."
"The Daily Californian," February 25, 1963.	Berkeley College, Berkeley, California.	"A Communist Writer and Journalist."
Ann Arbor, Michigan, "News," March 13, 1963.	University of Michigan.	"Editor of 'Political Affairs' Magazine, an Organ of the United States Communist Party."
Washington, D.C., "Sunday Star," March 17, 1963.	Howard University.	"Member of the United States Communist Party's National Committee."
"The Chicago Maroon," March 29, 1963.	University of Chicago.	"Editor of 'Political Affairs,' a Theoretical Organ of the American Communist Party."
"The Daily Cardinal," March 27, 1963.	University of Wisconsin.	"Leading Intellectual Spokesman for the American Communist Party."
"University of Washington Daily," May 8, 1963.	University of Washington.	"A Communist and a Communist Party Theorist."
"The State Journal," January 18, 1963.	Michigan State University.	"Communist Spokesman and Editor of the Leading Communist Political Magazine in the Country."
Los Angeles, California, "Herald-Examiner," October 15, 1963.	Hollywood High School.	"A Top Communist."
"The Spartan Daily," October 30, 1963.	San Jose, California, State College.	"Self-avowed Leader of the Communist Party in the United States."

BENJAMIN J. DAVIS, JR.

Newspaper Or College Publication	College Or University	Manner In Which Identified
"Daily Pennsylvanian," February 1, 1963.	University of Pennsylvania.	"A Spokesman for the United States Communist Party."
New York "Times," October 10, 1961.	Queens College	"National Secretary of the Communist Party, USA."
New York "Times," October 31, 1961.	Columbia University	"Secretary of the Communist Party of the United States."
Providence, Rhode Island, "Evening Bulletin," January 31, 1963.	Brown University	"National Secretary of the Communist Party."
Lorain, Ohio, "Journal," May 7, 1963.	Oberlin College	"United States Communist Leader."
Boston, Massachusetts, "Traveller," April 10, 1962.	Harvard Law School	"A Member of the American Communist Party."
Boston, Massachusetts, "Herald," April 19, 1962.	Harvard Law School	"National Secretary of the American Communist Party."
Seattle, Washington, "Times," October 31, 1962.	University of Washington.	"National Chairman of the Communist Party."
St. Paul, Minnesota, "Dispatch," April 20, 1962.	University of Minnesota.	"A National Spokesman for the Communist Party of the United States."
Minneapolis, Minnesota, "Daily Herald," May 3, 1962.	University of Minnesota.	"Executive Secretary of the Communist Party of the United States."

U.S. GOVERNMENT PRINTING OFFICE: 1964

s Court of Appeals
Columbia Circuit

DEC 27 1963

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,583

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA, *Appellant,*

v.

THE UNITED STATES OF AMERICA, *Appellee.*

Appeal from a Judgment of the United States District Court for the District of Columbia

APPELLANT'S PETITION FOR REHEARING

The Court's decision of December 17, 1963, reversed appellant's conviction and remanded the case to the District Court with instructions to grant a new trial if the government desires an opportunity to prove that a volunteer was available to sign forms IS-51 and IS-51a. We respectfully submit that the logic of the decision calls either for direction of an unqualified judgment of acquittal or for modification of the opinion so as to expand the terms of the government's burden of proof in the event of a new trial.

The Court holds (Slip Op. 9-10) that appellant is not criminally liable for the failure of its officers to sign the registration documents because "the privilege against self-incrimination was available to the officers as legal justification for refusing to sign," and "the November 10 letter was a sufficient assertion of their claim" of the privilege.

Our briefs demonstrated that, by the same logic, appellant is not criminally liable for the failure of an "other person" to sign the registration documents (Br. 16-17; Reply Br. 5). This is so because these documents require the "other person" to certify that appellant authorized him to complete and submit them on its behalf, and because this authority can be given only by appellant's officers who must thereby disclose their officership. The "other person" alternative, therefore, compels at least one of appellant's officers to make the incriminating admission of his officership to another person. As our briefs showed (*ibid.*), such a compelled admission is as much within the protection of the Fifth Amendment as is the admission of his officership which the officer would make directly to the Attorney General were he to execute the registration documents. Moreover, the letter of November 10, 1961, claimed the privilege of the officers not only against submitting the registration documents in their names, but also as the ground for their refusal to authorize a third person to submit them (J.A. 45).

Thus, to paraphrase the opinion of the Court (Slip Op. 9-10), "the privilege against self-incrimination was available to the officers as legal justification for refusing [to authorize a third person] to sign forms IS-51 and IS-51a" and "the November 10 letter was a sufficient assertion of their claim." Accordingly, "It follows that the jury should have been instructed that the officers were privileged not to [authorize a third person to] sign and that no liability attached to the Party by reason of their refusal."

The Court apparently overlooked the issue of the self-incrimination of an officer which the alternative method of submitting the registration documents involves. For the question is not mentioned in the opinion, which makes appellant's liability for the failure of a third person to submit the documents turn solely on the availability of a person willing to act, without regard to his authority to do so. This is why the Court accords the government

an opportunity to prove at a new trial that such a person was available.

Consideration of the issue presented by the requirement that the "other person" have authority from appellant to act for it would, we believe, demand a different result. If we are right that the authorization of a willing "other person" compels the self-incrimination of an officer, a judgment of acquittal is required since, by the Court's own logic (Slip Op. 10), no liability can attach to appellant because of the refusal of its officers to waive their constitutional privilege.

If the Court disagrees with this disposition of the case, it should, at a minimum, modify its opinion to make clear that the government has the burden of proving not only (1) the existence of a third person willing to submit the registration documents, but also (2) the existence of an officer willing to relinquish his privilege by authorizing the "other person" to act on behalf of appellant.

CONCLUSION

A rehearing should be ordered.

Respectfully submitted,

JOHN J. ABT
320 Broadway
New York 7, N.Y.

JOSEPH FORER
711 14th Street, N.W.
Washington 5, D.C.

Attorneys for Appellant

Certificate of Counsel

I certify that the within and foregoing petition for rehearing is presented in good faith and not for delay.

JOSEPH FORER

BRIEF FOR APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,583

467

COMMUNIST PARTY OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From a Judgment of the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 30 1963

Nathan J. Paulson
CLERK

J. WALTER YEAGLEY
Assistant Attorney General

KEVIN T. MARONEY
GEORGE B. SEARLS
LEE B. ANDERSON

Attorneys, Department of Justice
Washington 25, D.C.

Attorneys for Appellee

QUESTIONS PRESENTED

1. Whether the appellant was entitled to an acquittal on a charge of violating Section 15(a) of the Subversive Activities Control Act because filling out and filing the registration forms required under the Act would have incriminated its officers or members.

2. Whether the registration form requires appellant to admit that it is a Communist-action organization.

3. Whether on an indictment for failure to register and to file a registration statement under the Act appellant was entitled to a jury trial on the issue whether it is a Communist-action organization.

4. Whether the jury which heard the case was selected according to a procedure reasonably calculated to get a fair and impartial jury.

5. Whether appellant's failure to file a registration statement was an offense separate and distinct from its failure to register under the Act.

6. Whether the sentence of $10,000 on each count violated the Eighth Amendment or the requirements of due process.

7. Whether the indictment should have been dismissed because of the presence of government employees on the grand jury or, in the alternative, whether the district judge should have conducted a hearing on the qualifications of the grand jurors.

8. Whether the court correctly instructed the jury that the appellant could be found guilty if it acted knowingly and intentionally.

9. Whether the form of registration statement prescribed by the regulations of the Attorney General was so vague as to excuse appellant from complying with the Act in any respect.

INDEX

CITATIONS

Cases: Page

* Authorities chiefly relied on.

Cases—Continued

* Authorities chiefly relied on.

Cases—Continued

Constitutional Provisions:

Statutes and Rules:

* Authorities chiefly relied on.

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,583

COMMUNIST PARTY OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal From a Judgment of the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

STATEMENT

The facts in this case are simple, no material fact is disputed, and the statement in the appellant's brief (pp. 1-5) is sufficient.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are reprinted in the appendix to appellant's brief.

SUMMARY OF ARGUMENT

1. Appellant argues that the conviction must be reversed because the registration requirements violate the

privilege of its officers against self-incrimination. But as an "association" appellant has no privilege and even a natural person could not plead privilege on the ground that the testimony would incriminate another person. To hold that appellant is excused from complying with the requirements of the Act if it can supply no officer or representative who could sign for it without incriminating himself, would be to allow it a privilege it does not have.

By becoming officers of appellant the individuals assumed the organization's obligation of complying with lawful demands for information and records, so they are obligated as officers acting on behalf of the organization and not as individuals, to produce its records or the information therein, though the records and the information may tend to incriminate them personally.

The Act requires the appellant, once registered, to keep records, so the records and the information therein are not privileged.

The courts will try to make a reasonable adjustment between the right of the government to information and the privilege of the individual against self-incrimination. *In re Willie*, 25 Fed. Cas. No. 14,692e, pages 38, 39. Even assuming, contrary to law, that appellant can plead the privilege of its officers, on the known facts of which the Court may take judicial notice, the signing of a registration or of a registration statement would not subject appellant's officers to an additional danger of prosecution. Appellant's argument that *every* item of information called for by the registration documents would incriminate the officers is not correct on the face of the registration forms and to recognize it would be to recognize an absolute and impractical privilege going beyond any the courts have recognized.

Moreover, appellant could have the registration documents signed for it by an attorney or other person who would not run any real danger of self-incrimination.

2. The registration forms do not require appellant to confess, contrary to belief, that it is a Communist-action organization; it only has to *register* as such in accordance with the Board's order.

3. Congress could constitutionally provide for a full due-process hearing on the issue whether appellant is a Communist-action organization and then define the failure to register in accordance with the Board's order as a crime. It is for Congress to define crimes against the United States and the procedure under the Act is appropriate under the circumstances and provides due process of law.

Also, Congress could reasonably and properly define failure to register and failure to file a registration statement as separate and distinct offenses, and that is what the language of the Act does.

4. The examination on *voir dire* of prospective jurors was adequate and framed to weed out jurors who had a bias. The district court asked the jurors whether they had heard about the case, whether they could lay aside anything they had heard about the case and decide the case solely on the evidence. It instructed them that they should be impartial, decide the case solely on the evidence, and keep an open mind.

On specific subjects the court asked the jurors whether they had belonged to Communist or so-called "right-wing" organizations or subscribed to the publications of either. It inquired of the jurors whether they would doubt the truthfulness of a statement by an officer of the Party or the Party simply because of the fact that he was an officer or that it was the Party. It asked whether they, or members of their families, or close friends had been connected with government activities or agencies which are concerned with Communism. It also asked whether any of them or the members of their families were engaged in employment, or applicants for employment, which would require "security clearance."

The answers to none of these questions being in the affirmative, as a matter of discretion the district court's examination was adequate to develop any indications of possible bias.

5. To secure compliance with a statute which it regarded as important to the national security Congress

could properly make each day of failure to register a separate offense and provide for cumulative penalties. Respondent had already had a due process hearing plus judicial review on the question whether it was obligated to register and had deliberately disobeyed the Board's order, so the imposition of the maximum penalty did not offend the Eighth Amendment or deny due process.

6. Since the Supreme Court has held that government employees in the District of Columbia are eligible to sit on petit juries, it is *a fortiori* that they may sit on grand juries, since the grand jury merely remands for trial and does not decide guilt or innocence.

The Supreme Court has struck down indictments on the ground that the grand juries did not represent a fair cross-section of the community, but has not said that bias, or what kind of bias, on the part of one or more grand jurors will invalidate an indictment. As to hearings to inquire into the bias of individual grand jurors, the courts have generally denied them, except in rare cases where the allegations of bias are specific, individual, and strong. In this case the allegations as to bias are general and conclusory, and for that reason insufficient. To prefix a trial of the grand jury to the trial of the defendant would impede and hinder the administration of criminal justice and would trespass on the protective secrecy traditionally accorded grand jury proceedings. The grand jury was representative of the community, and the defendant's motion for a general exploration of their minds was rightly denied on the showing made.

7. The language of the Act does not require that an "evil" intent be proved in order to convict; failure to register falls within the class of cases where it need be proved only that the failure to comply was deliberate and intentional. If the appellant believed in good faith that it had a constitutional privilege not to register, then the conviction was proper, for in such situations the courts hold that a mistake of law is no defense.

8. The so-called "criteria" of membership in the Communist Control Act of 1954 do not define membership but

merely state types of facts to be considered in evidence. Since an element of "membership" in the Communist Party is that the organization recognizes that the person is a member, it is not true that the Party or its officers (*Killian* v. *United States*, 368 U.S. 231), can not know who its members are. All that Section 15(a) requires is a good faith effort to comply, so the questions in the registration form are not impossible to answer, nor are they vague.

In any event, this is a case of deliberate refusal to comply in any respect, so the appellant cannot set up as a defense that it did not understand completely some questions on the registration form.

ARGUMENT

1. The requirements of the Act and the regulations do not violate the privilege of appellant's officers against self-incrimination.

a. *Appellant may not defend on the basis of the privilege of its officers or members.*

The opinion of this Court which first reviewed the order of the Subversive Activities Control Board to the Party to register stated:

> "We conclude that neither the statute nor the orders requiring an organization to register can be held invalid because the possibility that the person or persons required to sign on behalf of the organization might be called upon to claim a privilege against self-incrimination." *Communist Party* v. *Subversive Activities Control Board*, 96 U.S. App. D.C. 66, 223 F. 2d 531, 550.

The Supreme Court did not find it necessary to decide the point, (*Communist Party* v. *Control Board*, 367 U.S. 1, 106-107), but it did point out that the privilege against self-incrimination must normally be claimed by the individual who seeks to avail himself of its protection.

Appellant is an unincorporated association, an "organization" (J.A. 50). As such, and not being a natural person, it is not entitled to the Fifth Amendment's privilege against self-incrimination. *Hale* v. *Henkel*, 201 U.S. 43, 75; *Wilson* v. *United States*, 221 U.S. 361, 382; *United States* v. *White*, 322 U.S. 694, 699; *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 196. "The privilege against self-incrimination cannot be invoked by a collective group." *Wigmore on Evidence* (McNaughton rev., 1961) § 2259a. And a natural person, who does have the privilege, may not plead it to protect another person against incrimination. *Hale* v. *Henkel*, *supra*, at 71; *United States* v. *White*, *supra*, at 704; *Rogers* v. *United States*, 340 U.S. 367, 370. The officers of a corporation or association can not plead the privilege when a subpoena duces tecum directs the corporation or association to produce records, although the records may incriminate them; as far as the assertion of the privilege is concerned they are "third persons". *Wilson* v. *United States*, 221 U.S. *supra*, at 382; *Oklahoma Press Publishing Company* v. *Walling*, *supra*, at 205, 208; *Shapiro* v. *United States*, 335 U.S. 1, 17; *Curcio* v. *United States*, 354 U.S. 118, 122; *McPhaul* v. *United States*, 364 U.S. 372, 380; *United States* v. *Austin-Bagley Corporation*, 31 F. 2d 229, 233-234 (C.A. 2), cert. denied, 279 U.S. 863.

The burden of appellant's argument is that it is altogether impossible for it to comply with the registration requirements without incriminating its officers, or members. But the obligation to register is that of the association, and none of the officers or members are parties to this proceeding. At least, as far as the officers are concerned, when they assumed their offices, they also assumed the corresponding obligation of supplying evidence from the files of the association where a competent legal authority calls on the association to produce it. See the cases cited *supra*. Because they are officers they are not privileged to refuse to furnish the records of the association, or the information there recorded. *Curcio* v. *United States*, *supra*; *Oklahoma Press Pubishing Company* v.

Walling, supra. The information they may be required to produce includes membership lists and accountings for monies received and paid, at least so far as those matters are contained in the records. *Heike* v. *United States*, 227 U.S. 131, 142-143; *Baltimore and Ohio Railroad* v. *Interstate Commerce Commission*, 221 U.S. 612, 613, 622.

In the case of the Communist Party the Subversive Activities Control Act requires the organization to keep records, the requirement being a necessary consequent of the registration and reporting provisions. *Communist Party* v. *S.A.C.B.*, 96 U.S. App. D.C. 66, 223 F. 2d 531, 547.

Since the United States may regulate the appellant, it may require it to keep records. *Shapiro* v. *United States*, 335 U.S. 1, 32. And the records being required by law to be kept, the information in them is not privileged. *Baltimore and Ohio R.R. Co.* v. *Int. Comm. Commm., supra; Shapiro* v. *United States*, 335 U.S. 1, 22; *Wigmore*, op. cit. § 2259(c); Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. of Chi. L. Rev. 687, 720.

Particularly in view of the provision of Section 4(f) that the fact of registration shall not be offered in evidence against an individual in any criminal trial, it would seem that the mere filing of a registration statement on behalf of the organization is no more an individual act for purposes of the privilege than is the act of bringing records into court. When an individual acts solely on behalf of the entity, his act should be judged as that of the entity and not of himself as an individual. Certainly as to naming of officers and members and as to accounting for monies the information required by the registration form does not require the officers or the signer "to disclose the contents of his own mind" (*Curcio* v. *United States*, 354 U.S. 118, 128), and the information is not privileged. *Communist Party* v. *S.A.C.B.*, 96 U.S. App. D.C. 66, 223 F. 2d 531, 547. As this Court recognized

in the opinion just cited, the principle of *United States* v. *White, supra*, applies, and in *White* the Court said:

> "But individuals when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties, and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in personal capacity, cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally." (322 U.S. at 699).

Along a similar line, assume the unlikely contingency of an organization being unable to find a single officer or representative who can register or file a registration statement for it without a real danger of further incriminating himself. In such a situation to say that the incriminable status of all the officers and representatives would relieve the organization of the obligation to register would in essential result be saying that an incorporeal, intangible collective group does have the right to plead the privilege, contrary to the cases cited *supra*. See, *United States* v. *3963 Bottles*, 265 F. 2d, 332, 336 (C.A. 7), cert. denied, 360 U.S. 931.

Moreover, putting aside any question whether the organization may plead the privilege of its officers, as a practical matter it does not appear that the signing of a registration or a registration statement by any of them will add in any real sense to their danger of being prosecuted. "Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, petitioner cannot invoke the privilege where response to the specific question in issue would not *further* incriminate her." *Rogers* v. *United States*, 340 U.S. 367, 372. (Emphasis added).

"[T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." *Mason* v. *United States*, 244 U.S. 362, 365-366. See also, *Curcio* v. *United States*, 354 U.S. 118, 124; *Heike* v. *United States*, 227 U.S. 131, 143, 144; *Commonwealth* v. *Joyce*, 326 Mass. 751, 97 NE (2d) 192.

On principle it would seem that when, under given circumstances the privilege would not in fact serve a purpose of protecting an individual against a danger to which he would not be exposed were he not required to answer, there is no reason for applying the privilege. *Communist Party* v. *S.A.C.B.*, 96 U.S. App. D.C. 66, 223 F. 2d 531, 549. As we have pointed out *supra*, citing *Rogers* and *Mason*, whether a person is entitled to the privilege turns on the facts of the particular case.

As a matter of record in this case, on June 8, 1962, Gus Hall presided at a press conference at 26 West 23rd Street, New York City, at Communist Party Headquarters (J.A. 33), at which he said, "In no way do we intend to comply with the law" (J.A. 35). During the conference, at which Mr. Hall said what the Communist Party would do and would not do, Elizabeth Gurley Flynn and Benjamin J. Davis sat with him at the table (J.A. 35). Gus Hall and Benjamin Davis were both defendants and were convicted in the original Smith Act prosecution, *Dennis* v. *United States*, 341 U.S. 494, and Elizabeth Gurley Flynn was one of the defendants convicted in *United States* v. *Flynn*, 216 F. 2d 354 (C.A. 2), cert. denied, 348 U.S. 909. All three are still active in Party affairs, as a matter of common knowledge,[1] and they have never attempted to conceal their membership or their positions of leadership. Even if Section 4(f) of the Act

[1] For Hall and Mrs. Flynn, see *The Worker* of March 31, 1963. See also *The Saturday Evening Post* of May 18, 1962.

did not stand as a bar to its use in evidence, a prosecutor, assuming any or all of the three persons named were to be prosecuted under Section 4(a) of the Act or for a second time under the Smith Act, would in no conceivable circumstances find it necessary to prove their Party membership or leadership by showing that they had signed a registration for the Party or named its officers and members in a registration statement.[2]

"The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination." *Hoffman* v. *United States*, 341 U.S. 479, 486. And, see, *Rogers* v. *United States*, *supra*.

Not only would a registration or a registration statement not be admissible in evidence by reason of Section 4(f), but it is improbable that it would disclose as to the leaders of the Party anything new which could serve as either a "link" or a "lead."

"It is conceivable that almost any fact which is required to be stated by any of our recording statutes might become an element to be proved in support of some criminal charge. * * * In our opinion, however, the rule against self-incrimination does not extend to cover such mere possibility." *Commonwealth* v. *Joyce*, 326 Mass. 751, 97 N.E. (2d) 192, 194. And see *Wigmore*, op. cit. §§ 2252, 2260.

Appellant argues broadly (pp. 18-22) that every item of information called for by the registration documents incriminates the officers that supply it. The form of registration statement prescribed by the regulations (J.A. 60-63), calls for substantially the same information as does Section 7(d) (50 U.S.C. 786), as amended (68 Stat. 586), set out in the appendix to appellant's brief, pages 7a-9a. That section requires that the statement contain (1) the name of the organization and the address of its principal office; (2) the name and addresses of officers; (3) an

---

[2] We do not mean to intimate that the same situation does not exist with respect to persons other than the three we have named.

accounting for the 12 months preceding of monies received and expended; (4) the names and addresses of members;[3] (5) a listing of all printing presses and similar devices in the possession or control of the organization or of its affiliates and associates.[4]

As stated in the quotation from *Commonwealth* v. *Joyce*, *supra*, almost any fact may become an element of proof in a criminal case,[5] but the logical conclusion from appellant's argument would be that no information at all can be required under any regulatory or recording statute, because it might in some hypothetical case be evidence or a "link", or furnish a "lead."

Appellant argues that it may not, consistent with the Fifth Amendment, be required to furnish any information, because, in the context of the Board's findings with respect to the Party's objectives, Section 4(a) and the Smith Act "have so surrounded association with the Communist Party with criminality that any information concerning the personnel or activities of the organization incriminates its officers and members." (p. 19).[6]

---

[3] This requirement applies only to Communist-action organizations.

[4] The Supreme Court held these requirements to be reasonable. *Communist Party* v. *Control Board*, 367 U.S. 1, 88-105. The form prescribed by the Attorney General also calls for a statement of assets and liabilities and for the names of banks used. (J.A. 61). These appear to be reasonable implementations of Sec. 7(d)(3).

[5] As the Court observed in *Killian* v. *United States*, 368 U.S. 231, 242 "almost everything is evidence of something."

[6] If any item of information called for in the registration statement is not to be found in the Party's records—for example, the total number or locations of printing presses—the person signing the statement can say so. There would not be a "willful" violation when a bona fide effort has been made to comply. And it is difficult to see how such items as the registrant's name and address, the names of the banks used, and the total number of members could be incriminating. If the appellant can set up at all the privilege of its officers, it must show more than the bare assertion that *every* item is incriminating or would tend to incriminate. *Mason* v. *United States*, 244 US 362; *Brown* v. *Walker* 161 US 591, 599-600.

There is authority for the view that a failure to register at all

This extreme argument would lead to the absurd result that a Communist organization may be required to register (*Communist Party* v. *Control Board*, 367 U.S. 1), but that it may not be required to do anything about effectuating a registration. The result would be "effectually to remove such organizations beyond the reach of legislative and judicial commands." *United States* v. *Fleischman*, 339 U.S. 349, 357, citing *Wilson* v. *United States*, *supra*, and *Brown* v. *United States*, 276 U.S. 134. Cf. *United States* v. *White*, *supra*.

In *Blau* v. *United States*, 340 US 159, 161, the Court said that prosecution under the Smith Act of a witness who "admitted employment by the Communist Party or intimate knowledge of its workings" was more than "a mere imaginary possibility." *Blau* was decided before the Smith Act decisions in *Dennis* v. *United States*, 341 US 494, *Scales* v. *United States*, 367 US 203, and *Noto* v. *United States*, 367 US 290, as well as before this Court's decision in 1954 in the registration case and the Supreme Court's decision in 1961. We do not suggest that the limitations imposed by these decisions on Smith Act prosecutions have out-moded *Blau* completely, but they do at least call for a re-examination of the real scope of the application of the opinion. During the trial of Aaron Burr, Chief Justice Marshall set out the rule thus:

> "Where two principles come in conflict with each other, the court must give them both a reasonable construction, so as to preserve them both to a reasonable extent. The principle which entitles the United States to the testimony of every citizen, and the principle by which every witness is privileged not to accuse himself, can neither of them be entirely disregarded."

In re Willie, 25 Fed. Cas. No. 14, 692 e, pages 38, 39, quoted in *Mason* v. *United States*, 244 U.S. 362, 364.

---

means that the person or associations concerned can not claim the privilege. *United States* v. *Kahriger*, 345 US 22, 32; *United States* v. *Sullivan*, 274 US 259, 263; *Campbell* v. *Chase Nat. Bank of City of New York*, 5 F. Supp. 156, 178 (SDNY), appeal dism. 291 US 648; *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D.Ill.).

On appellant's argument the principle that the United States is entitled to require a Communist organization to register would, in the words of the Chief Justice, "be entirely disregarded." Such a result is not required by *Blau*, for in that case the petitioner was a natural person, not an organization or association, and the questions actually asked went to her personal knowledge and not to the contents of records required by law to be kept.

In any case, as we have already pointed out (*supra*, pp. 9-10) in the circumstances of this case it will not be necessary to draw the exact line between the registration requirements of the Act and the limits of the privilege against self-incrimination because there are persons who would not *further* incriminate themselves.[7]

b. The regulation permitting the organization to have the registration and the registration statement signed by a person other than an officer is constitutional.

According to the regulations issued under the Act by the Attorney General in 1961 the registration and the registration statement may be signed and filed on behalf of the organization by a person who certifies that he has been authorized by the organization to do so, rather than by an officer (J.A. 57-58, 158-63).

Appellant rejects the "other person" method as unworkable, asserting that it requires the officers to incriminate themselves by identifying themselves as such to the other person, and that no person would be so foolhardy as to incriminate himself by signing the registration and the statement (Br. 16-18).

Again the appellant casts its argument too wide. As we have suggested (*supra*, p. 12), in the light of later decisions the dictum in *Blau* that admission of employment by the Communist Party would be incriminating

---

[7] In the proceeding before the Board two members of appellant's National Committee testified that they were such members. One of them, Mrs. Flynn, is still active in Party affairs (*supra*, pp. 9-10).

should not be read too literally. Up to the present time the Party has openly maintained offices and functioned as a going organization. The person who signs need not be a member of the Party.[8] If the Party should give the person signing written authority, signed in the same way as the letter of November 10, 1961, and bearing the Party seal (J.A. opp. p. 70), that would seem to be sufficient authority. Or the person may be instructed or requested to sign by the man or woman who is in a position of authority in the Party office, and who, to the knowledge of the employee is the one who gives orders and has authority, without the officer having to state to the person that he is an officer. We venture to say that the clerical workers in the office would know, without any explicit instructions, who the person or persons are who run the office. Indeed, as we have pointed out earlier (*supra*, pp. 9-10) at least some of the leaders of the Party have admitted their positions openly for years. And it would hardly furnish a "link" or a "lead" to anything undisclosed if Gus Hall or Mrs. Flynn should instruct or request an employee to sign the registration and the registration statement.

In a somewhat similar situation involving interrogatories addressed to a corporation by the Food and Drug Administration, the court said:

"It was the duty of this corporate claimant to select an agent who without fear of self-incrimination could provide the information requested. The interrogatories were addressed to the corporation and the answer sought was that of the corporation . . . It would indeed be incongrous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." *United States* v. *3963 Bottles*, 265 F (2d) 332, 336 (C.A. 7), cert. denied, 360 US 931.[9]

---

[8] See Note, 51 Col. L. Rev. 606, at 621.

[9] This Court suggested (223 F(2d) at 549-550) that immunity might be granted under 18 USC 3486(c), one of the immunity pro-

Appellant summarily rejects (Brief, pp. 16-17 n 8) the possibility that the registration forms might be signed by an attorney, on the ground that the "lawyer-client privilege does not apply to the identity of the client." That is beside the point, for the identity of the client for whom the lawyer was registering would be plain on the face of the papers. Appellant has been represented by counsel through the whole registration proceeding and in this case, without any suggestion that they have incriminated themselves or waived any privilege. Because a layman might sign does not mean that an attorney could not sign *as an attorney*. His client would be the Party, not a particular officer.

In such a situation, the attorney would not be bound to disclose on the statement more than the identity of the client which, as we have pointed out, would be apparent anyway. See, *Wigmore, op. cit.* § 2213.

2. The Act and Form IS-51a do not require appellant to describe itself as a Communist-action organization

Appellant argues (Br. 24-25) that the registration form—IS 51a—requires it to describe itself as a Communist-action organization, that is, a Soviet-controlled seditious conspiracy, and that this requirement is unconstitutional because it requires appellant to declare its concurrence in official declarations which it and its officers and members do not believe.

This argument misconstrues the language of Form IS 51a and the provisions of the Act. The Form does not

---

visions of the Act of August 20, 1954, c. 769, Section 1, 68 Stat. 745. See, *Ullmann* v. *United States*, 350 US 422. But the immunity statute in question is limited by its terms to cases or proceedings "before any grand jury or court of the United States" involving the national security. Registration with the Attorney General is not a case or a proceeding, and the language of the statute would seem to exclude the possibility of granting immunity in connection with the process of registering organizations with the Attorney General.

require the appellant to *describe* itself as a Communist-action organization as that term is described in the Act or to admit that it is one; all that is required is that the appellant *register* as a Communist-action organization, in accordance with the order of the Board (JA 52), as affirmed by the Courts. A registration under compulsion of law is not an admission, for the essence of an admission is that it is voluntary; and nothing in the Act nor in the regulations attempts to compel appellant's officers and members to forswear their beliefs, or to say that appellant is what they allege they do not believe it to be.

The defendant who executes a deed under the compulsion of a decree of specific performance does not thereby admit that his adversary is the rightful owner of the property. Against the background of this litigation no one could say that a registration form filed by appellant following a full hearing before the Board and judicial review was filed voluntarily or amounts at most to more than an admission of its identity with the respondent in the original petition filed with the Board.

This follows from the language of the Act and of the regulations. Section 7(a) (50 U.S.C. 786) applies to organizations which file voluntarily as well as to "organization[s] required, by a final order of the Board, to register as a Communist-action organization." The Form IS-51a (J.A. 57) merely requires a statement that "- - - - - hereby *registers* as a [Communist-action] organization." That the filing of the Form does not operate as an admission also follows from the provision of Section 4(f) that, "The fact of registration of any person under section 7 or section 8 of this title shall not be received in evidence against such person in any prosecution - - -."

There is nothing to the contrary in the Labor Board cases appellant cites. Those cases turn in large part on the language and purposes of the act under which the Labor Board acted and hold no more than that while the Board may order the employer to comply with the act

in the future in "complete compliance with the order.", it may not also order a statement which plainly implies an admission of past violation. See, *Art Metals Const. Co.* v. *N.L.R.B.*, 110 F. (2d) 148, 151 (CA 2); *Hartsell Mills Co.* v. *N.L.R.B.*, 111 F(2d) 291, 293 (C.A. 4). See also, *N.L.R.B.* v. *Louisville Refining Co.*, 102 F (2d) 678, 681 (C.A. 6).

Like the Labor Board, the Subversive Activities Control Board is given no power to punish for past violations, but it is given power to require future compliance, and in this situation compliance means registration and the filing of a registration statement.

3. Appellant was not entitled to the right to re-litigate the "Communist-action organization" issue.

The appellant was indicted for failing to register with the Attorney General when there was outstanding a final order of the Board requiring it to register, and the statutory period of 30 days had elapsed without compliance (J.A. 51).

The trial court instructed the jury that the Board determination "is binding on you and me" and that "we start from the proposition that this defendant is a Communist-action organization, and, therefore, is duty bound to register under the Act and to file the registration statement" (J.A. 44).[10]

The appellant insists that it was unconstitutionally deprived of its right to try before the judge and jury the issue whether it is a "Communist-action organization." But that was not an issue in the case, according to the language of the Act. Section 15(a) (50 U.S.C. 794) reads:

> "If there is in effect with respect to any organization or individual a final order of the Board re-

[10] Note: It is claimed (Br. 29) the conviction and its statutory authorization violate the following provisions of the Constitution: Article III, sec. 2, clause 3, and the Sixth Amendment, both requiring the trial of crimes by jury; due process of law; Article III, sec. 1, vesting the judicial power of the United States in the courts; and Article I, sec. 9, clause 3 prohibiting bills of attainder.

quiring registration under section 7 or 8 of this title—

(1) such organization shall, upon conviction of failure to register,[11] to file any registration statement or annual report, or to keep records as required by section 7, be punished for each such failure by a fine of not more than $10,000 and * * *"

Under this language the issues in the case are: whether there is a final order of the Board requiring registration;[12] and whether the appellant complied with the order within the time limited by the statute. Whether appellant is or is not a Communist-action organization is not an issue in the case; it *is* an organization with respect to which a final order to register is in effect.

Congress, of course, has the power to define crimes against the United States. *Viereck* v. *United States*, 318 U.S. 236, 241; *Frend* v. *United States*, 69 App. D.C. 281, 100 F.2d 691, cert. denied, 306 U.S. 640; *Hunt* v. *Hudspeth*, 111 F. 2d 42 (C.A. 10).[13] And appellant's contentions that the Act is a bill of attainder and denies it due process were disposed of by the Supreme Court and the earlier opinion of this Court. *Communist Party* v. *Control Board*, 367 U.S. 1; *Communist Party* v. *S.A.C.B.*, 96 U.S. App. D.C. 66, 223 F. 2d 531, 553-554, 558.

The law is replete with instances in which a status or a duty is established administratively, to be followed by criminal prosecution in the event of subsequent acts or omissions by the persons affected. A significant analogy

---

[11] Section 7(c) (50 U.S.C. 786(c)) requires that the registrations be accomplished within 30 days after the Board's order becomes final.

[12] The fact that the Board had made an order requiring registration was stipulated (J.A. 51a-55a).

[13] Appellant argues (Brief, 47-49) that it was not required to file a registration statement because it did not register. But the language of Section 15(a) makes failure to register and failure to file a registration statement separate offenses, "failure to register, to file any registration statement *or* annual report." (emphasis added) This definition was within the power of Congress. See, *Hunt* v. *Hundspeth, supra.*

is found in the selective service legislation and the cases arising thereunder. The hundreds of thousands of draft classifications have not been established by jury trials; yet refusals to comply with the requirements of the classification have been made crimes by statute, and the validity of the legislation has been upheld. As the Court observed in *Cox* v. *United States*, 332 U.S. 442, 453:

> The concept of a jury passing independently on an issue previously determined by an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order. * * * [14]

Freight tariffs, price controls, and similar regulations established by administrative proceedings have also long been upheld. In *Yakus* v. *United States*, 321 U.S. 414, 444-445, the Court said:

> * * * [W]e are pointed to no principle of law or provision of the Constitution which * * * precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.
>
> * * * *
>
> For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fixing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. §§ 6(7); *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81; *United States* v.

---

[14] Appellant attempts to distinguish *Cox* on the ground that a draft classification is not the equivalent of an administrative determination that a person has engaged in conduct which subjects him to liability (Br. 32). But a draft classification is an adjudication that the individual *is* subject to certain duties and obligations.

> *Adams Express Company*, 229 U.S. 381, 388. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution.[15]

Similarly, in contempt proceedings based on refusal to obey a preliminary injunction, the Supreme Court held that, even if the injunction was erroneously issued, "we would * * * affirm the judgment for criminal contempt as validly punishing violation of an order then outstanding and unreversed." *United States* v. *United Mine Workers*, 330 U.S. 258, 289-295. To the same effect, there can be no doubt that an employer charged with refusing to obey a court of appeals judgment enforcing an order of the National Labor Relations Board would not be entitled to relitigate judicially the administrative determination which the court had approved.

That is, at least in the situation where there is provision for a full and fair hearing, with judicial review, before an administrative order becomes effective, there is no constitutional reason why Congress can not define as a crime the disobedience of a lawfully issued administrative order.[16]

---

[15] Appellant points out (Br., 32) that *Yakus* involved administrative rule-making, not adjudication, citing the dissenting opinion of Justice Jackson in *United States* v. *Spector*, 343 U.S. 169, 179. The significance of the distinction is dubious. Under the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*), which applies to the Subversive Activities Control Act, at least as to hearings (Sec. 16, 50 U.S.C. 795), some rule-making as well as adjudication is subject to requirements of notice and hearing, 5 U.S.C. 1003. And in any case, the suggested distinction does not affect the construction of Sec. 15(a).

[16] Appellant relies on *Wong Wing* v. *United States*, 163 U.S. 228 (Brief, pp. 29, 30), which is easily distinguishable. In that case the statute authorized a sentence of imprisonment of an alien to be imposed by a United States Commissioner, and the alien would never get a trial on any issue by judge and jury.

On appellant's contention, the administration of the regulatory provisions of the Subversive Activities Control Act would effectively be transferred from the administrative agency where Congress placed it, to the courts, since the administrative order would be at most advisory, and every issue that had been fought out at length and decided would have to be re-litigated in the criminal trial. Congress has defined the crime clearly and reasonably and has given the organizations affected a right to a full criminal trial, including the guarantees of indictment and trial by jury.

4. The jurors were selected in a manner fair to both parties.

The appellant was entitled as a matter of constitutional right to a trial by an impartial jury. And if the questions the court asked of prospective jurors on the *voir dire* were reasonably calculated to obtain an impartial jury, then the appellant has no just cause for complaint because the court did not ask some other questions it requested. *Hayes* v. *Missouri*, 120 U.S. 68, 71; *Shettel* v. *United States*, 72 App. D.C. 250, 113 F. 2d 34, 36. As to the questions to be asked to obtain an impartial jury the trial court has, and must have, a broad discretion. *Aldridge* v. *United States*, 283 U.S. 308, 310; *Sellers* v. *United States*, 106 U.S. App. D.C. 209, 271 F. 2d 475; *Fredrick* v. *United States*, 163 F.2d 536, 550 (C.A. 9).

At the beginning of the *voir dire* the court asked the panel of jurors whether they had heard or knew anything about the case. Only two had, and of them one was challenged by the Government (J.A. 20) and the other was (Einhaug) excused (Tr. 42).[17] The court then asked: "Does any one of you know of any reason why you cannot fairly and impartially decide the issues of this case solely on the evidence to be introduced at this trial, if you were selected to serve on this jury?" (J.A. 21) He had just inquired, in open court and in the

[17] The reference is to the Transcript of Proceedings.

presence of the panel, of one of the jurors who had heard about the case and who said that he had formed an opinion, whether he would be able to lay aside anything he had read or any opinion that he might have formed and decide the case solely on the evidence to be introduced (J.A. 20).[18]

After this introduction the court proceeded to ask three questions requested by the Government as to membership in a number of organizations, including the Communist Party and the Young Communist League (J.A. 27), as to whether any juror had been employed by or subscribed to any of a number of publications, including *The Worker*, *The Communist*, and *Political Affairs* (J.A. 28), and as to whether any of them had ever been a member of or employed by certain other organizations (J.A. 28).

As requested by the appellant the court asked the prospective jurors:

"Would the fact that a person is an officer of the Communist Party in itself and without anything else cause you to have some doubt as to his truthfulness?"

"Would you have a doubt as to the truthfulness of a statement made by the Communist Party simply because of the fact that it was the Communist Party which made the statement?" (J.A. 28)[19]

Also at the request of the appellant the court asked the jurors whether any of them had ever testified before the House Committee on Un-American Activities or "any other committee or agency engaged in investigating communism" (J.A. 29), or whether any member of their immediate families or close friends had been a member of or employed by any such committee (J.A. 29). That

---

[18] This would appear to cover appellant's requested question No. 6 (J.A. 19). See, J.A. 25. The question, as we have stated, was asked in the presence of the whole panel before any jurors had been chosen, and must have been taken by the panel as a general admonition.

[19] No juror answered in the affirmative. These corresponded to requested questions Numbers 9 and 10 (J.A. 22).

the Communist Party was involved in the case was, of course, clearly apparent (J.A. 18), and it was proper for the court to ask, as the appellant had requested, whether any of the jurors had been connected with governmental activities concerning Communism. The court, however, declined to put to the jurors the first five questions requested by the appellant, starting with "1. Do any of you hold any feeling of ill-will or hostility toward the Communist Party of the United States?", and ending with "5. Do any of you believe that the Communist Party is a threat to the safety or well-being of yourself or your family?" (J.A. 21). Those questions might have been proper, but to ask them might well have given an impression that they should as jurors be hostile to the Communist Party. There was no issue in the case as to the teachings, good or bad, or activities of the Party—apart from the registration requirement—and it was not an abuse of discretion to decline to belabor the point.[20] Taken as a whole the *voir dire* was calculated to elicit from the jurors any reason any of them might have to be biased, and they were instructed that they should be impartial, should decide the case only on the evidence, and to keep an open mind (J.A. 32).[21]

Appellants complain of the court's refusal to ask the question, "11. Have any of you ever been the subject of a government loyalty or security investigation?" (J.A. 22). But all government employees had been excluded from the jury by agreement of counsel (J.A. 18),[22] and

---

[20] In *United States* v. *Barta*, 149 F. 2d 489, 490-491 (C.A. 2), a case tried during World War II, the court refused to ask the jurors questions designed to discover whether membership in the Nazi Party would prejudice them, but did ask them whether they could not impartially try the case solely on the evidence, and the Court of Appeals held there was no abuse of discretion.

[21] In *United States* v. *Dennis*, 183 F. 2d 201 (C.A.2), affirmed 341 U.S. 494, the trial court declined to ask on the *voir dire* a series of questions similar to those submitted by them appellant.

[22] Counsel admitted (J.A. 27) that the court's examination covered the appellant's requested question 30, "Do you know of any reason why you should not serve as a juror in this case?" (J.A. 25).

the court did ask six questions as to whether any of the jurors or members of their immediate families were in employment requiring government security clearance or applicants for such employment (J.A. 29).[23] The subject of "loyalty" or "security" clearance was fully covered, except for the unlikely possibility that a person not employed by the government and not having or seeking employment which required security clearance might have been subject to a government loyalty or security investigation.[24]

In addition the court asked several questions as to whether any of the jurors were, or members of their families or close friends were, in employment that might cast doubt on their impartiality, as with the Department of Justice, the F.B.I., the United States Attorney's Office or other law enforcement or police agencies.[25]

Also at the request of the appellant the court inquired as to subscriptions to a number of anti-Communist or "right-wing" publications, whether they were or had been members of the American Legion and whether any of them were or had been members of the John Birch Society, the Klu Klux Klan, and numerous other organizations. No juror answered in the affirmative to either question (J.A. 30-31).

The court declined to embark on an investigation of whether any of the jurors had ever seen, read, or heard anything unfavorable or derogatory about the Communist Party (Q.8, J.A. 22, 25). Undoubtedly jurors had seen something in print at some time or heard something about Communism or the Party, but to embark on an

---

[23] The questions put by the Court covered appellant's requested questions 13, 14, 15, and 16 (J.A. 22).

[24] On appellant's own citation only some 20 percent of persons in private employment have completed loyalty statements or obtained official security clearance, and that figure includes those subject to "private scrutiny" (Br. 41 n 17).

[25] Several jurors were excused on that ground. Transcript, pp. 34-36.

investigation of what every juror had read or heard along that line would probably have been of little assistance in determining impartiality, particularly in view of the panel's failure to answer affirmatively either of the questions we have just mentioned. And, of course, the impact of news items, even when continued over a long period, is apt to be over-estimated (*United States* v. *Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y.), and any prejudice may be exorcised by proper instructions, such as were given in this case. See *Beck* v. *Washington*, 369 U.S. 541, 548.

Appellant also complains of the court's failure to ask Question 23, "Aside from the organizations just named, have any of you ever been or are you now a member of or contributor to any organization or group which has as one of its major policies a policy of antagonism or hostility toward the Communist Party?" (J.A. 24). The question would have put on the juror the difficult task of determining what a "policy of antagonism" meant and the even more difficult one of determining whether it was a "major policy." The court did question the jurors, as requested by appellant, about membership in 21 organizations, and it could properly as a matter of discretion stop there.[26] The district court was not bound to attempt the task of amending or reworking such an overloaded and sweeping question, if he had been asked to do so; certainly his failure to do so would not amount to reversible error. See, *Beatty* v. *United States*, 27 F. 2d 323 (C.A. 6) (cited by appellant at page 34) where one permissible question and six improper questions were all refused. The failure to put the permissible question was not properly presented for review, and the appellate

---

[26] In *Smith* v. *United States*, 262 F. 2d 50 (C.A. 4), cited by appellant (Br. p. 45), it was held error to refuse to question a jury about membership in organizations "dedicated towards racial hatred," a more limited and intelligible test, for "dedicated" implies the most important, the main purpose of an organization. *People* v. *Reyes*, 5 Cal. 347, cited by appellant on page 44 dealt with one specified organization, the objectives of which were notorious.

court declined to notice the error, since the result of the case was not plainly unjust.

The failure to put question 20 as to whether the jury had read books or articles on Communism by J. Edgar Hoover and others was not prejudicial, particularly since the court did ask the jury about the publications to which they subscribed, including publications of the American Legion (J.A. 23-24, 30).[27] Similarly, it was not an abuse of discretion to decline to ask the jurors whether any of them would be embarrassed by voting for acquittal, if the fact became known (Q.25, J.A. 24). *Morford* v. *United States*, 339 U.S. 258, which appellant cites does not call for a different result; that case dealt with the political climate resulting from the "Loyalty Order", and the questions of security clearance and the like were adequately covered by the district court (*supra*, pp. 23-24).[28] Cf. *United States* v. *Barra, supra.*

Appellant also requested a question (Q. 28, J.A. 25), whether any of the jurors had served on a grand jury which investigated Communist activity. The court declined to put the question in that form but did ask whether any one had served on any grand jury during the past 5 years, which would appear to cover the subject matter adequately. It has been held not to be error to refuse to ask jurors whether they had previously sat in cases of the same type as the case on trial. *Alverez* v. *United States*, 282 F. 2d 435, 437 (C.A. 9); *Spells* v. *United States*, 263 F. 2d 609, 612 (C.A. 5).

---

[27] The same applies to requested Question 24 whether the jurors listened regularly to certain radio programs (J.A. 24). Sufficient questions were asked to get a clue to the particular kind of appellant was looking for, if any of the jurors possessed it.

[28] Appellant's suggestion that the refusal to ask questions whether any of the jurors had given information to the F.B.I., the House Committee, etc. (J.A. 22-23) may have allowed informers to sit on the jury can only be described as fanciful. See Brief, p. 42. There is no factual foundation shown or even indicated for the suggestion.

The eligibility and impartiality of a prospective juror must necessarily be determined as a matter of discretion by the trial judge. For a reversal, "It must be made clearly to appear that upon the evidence the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." *Reynolds* v. *United States*, 98 U.S. 145, 156. See also, *Dennis* v. *United States*, 339 U.S. 162, 168; *United States* v. *Sferas*, 210 F. 2d 69, 75 (C.A. 7), cert. denied, 347 U.S. 953.

A reasonable examination on the *voir dire* must, of course, be had to enable the defendant to decide, when to challenge for cause and when to challenge peremptorily,[29] and to afford reasonable assurance that the jury is impartial. But an examination which is needlessly detailed or prolonged is not required, bearing in mind the practicalities of trial procedure and the fact that excessive questioning can only tend to exclude the conscientious and intelligent. *Funk* v. *United States*, 16 App. D.C. 478, 489. See also, *United States* v. *Dennis*, 183 F. 2d 201, 226-228 (C.A. 2), affirmed, 341 U.S. 494; *United States* v. *Barra*, 149 F. 2d 489, 490-491 (C.A. 2). The district court's questioning here of the prospective jurors was sufficiently definite and pointed to insure that the condition of mind of the proposed jurors was free of bias. See, *Snell* v. *United States*, 16 App. D.C. 501, 506.

The appellant proposed a total of 31 questions. Two appear to have been withdrawn, one was covered by what the court said, as counsel agreed (J.A. 27), 10 were asked in full and two in part (Brief, p. 35 n. 15). The range of the questions asked covered in whole or in part the subject matters which would or might have given rise to prejudice or a disqualifying opinion, and it is well settled that in determining what questions to ask prospective jurors on the *voir dire* and in ruling on chal-

---

[29] In this case the appellant used all its peremptory challenges. Transcript, p. 44-6 and 44-7.

lenges the trial court has a broad discretion. *Dennis* v. *United States*, 339 U.S. 162, 168; *Aldridge* v. *United States*, 283 U.S. 308, 310. Nothing disclosed by the *voir dire* furnishes any basis for suggesting that any of the jurors had disqualifying opinions or were biased; on the evidence it must be concluded that they were impartial, and that the appellant has failed to show error. *Dennis* v. *United States*, 339 U.S. 162, 168, 170.

5. The sentence was constitutional and did not deny appellant due process of law

In Section 2 of the Act (50 U.S.C. 781) Congress found that there is a world Communist movement whose purpose is to establish in the United States and throughout the world a totalitarian dictatorship. As "appropriate legislation" to prevent that movement from establishing its purpose in the United States it enacted the registration provisions of the Act, not for purposes of exposure but to regulate Communist organization by requiring disclosure of the names of their officers and members and certain details of their activities. *Communist Party* v. *Control Board*, 367 U.S. 1, 90-103.

Against these Congressional findings appellant's statements as to "the innocuousness of the offenses" and "no damage to the public interest" are unconvincing. And, since a large organization might consider a single penalty for disobedience to be *de minimis*, Congress made each day of failure to register a separate offense (Sec. 15(a), 50 U.S.C. 794). Having in mind the gravity of the national interest involved and the nature of the danger Congress found, it could properly enact the penalty it did in an effort to force compliance with what Congress regarded as an important statute.[30] Congress had the will to make each day of non-compliance a "unit of prosecution" (*Bell* v. *United States*, 349 U.S. 81, 83) and that is what it did.

---

[30] Cumulation of penalties is not peculiar to the Subversive Activities Control Act. For similar provisions, see, for example, 7 U.S.C. 13a, 15 U.S.C. 50, 33 U.S.C. 519, 49 USC 16 (8).

It is settled that the extent of the permissible punishment under an otherwise valid statute is, subject only to the Eighth Amendment, a matter of exclusive legislative discretion. *Blockburger* v. *United States*, 284 U.S. 299, 305; *Gore* v. *United States*, 357 U.S. 386. And in a case of deliberate defiance of a valid statutory requirement the sentence to the maximum penalty is not to be deemed an excessive fine. The penalty is not so clearly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice. See, *Kasper* v. *Brittain*, 245 F. 2d 92 (C.A. 6), cert. denied, 355 U.S. 886.[31]

Ex parte Young, 209 U.S. 123, cited by the appellant (Br. 51) does not call for a different result. The statute involved in *Young* did not provide for judicial review of the Administrative order. Here, a due process hearing and full judicial review are provided and have been had, and when appellant disobeyed the Board's order it knew that it had been held valid by the Supreme Court, and that the order had been affirmed.

Nor can the opinion in *Ex parte Young*, *supra*, be read as enunciating a rule that cumulative penalties, validly imposed under a statute, may not be inflicted in the circumstances of this case. Justice Holmes did not so decide in *Gulf, C. and S.F. Co.* v. *Texas*, 246 U.S. 58, 62, and appellant cites no other authority.

---

[31] The application of Section 15(a) to individuals who may be responsible for failing to register an organization is not, of course, before the Court.

Even though the statute might be applied in an unreasonably harsh manner in a particular case, still the Act itself is constitutional. *Badders* v. *United States*, 240 U.S. 391, 394; Cf. *e.g.*, *Marcus* v. *Hess*, 317 U.S. 537, 552; *Blockburger* v. *United States*, *supra*; *Gore* v. *United States*, *supra*; *Ebeling* v. *Morgan* 237 U.S. 625.

6. The District Court did not err in denying appellant's motion to dismiss the indictment because of the presence of government employees on the grand jury, or in denying the motion for a hearing on the qualifications of the grand jurors.

Appellant's basic contention is that neither the Communist Party, nor, presumably, any Communist, can properly be indicted by a grand jury on which government employees sit. This contention is based on allegations in counsel's affidavit that the government employees are so conditioned by the government's anti-Communist orientation, public and private pressures, and the general climate of opinion, that they are psychologically disabled from disagreeing with accusations placed against appellant by prosecutors.

a. The presence of government employees on a grand jury does not automatically invalidate the indictment.

Appellant's motion to dismiss the indictment was properly denied. Its argument is answered by the cases holding that government employees, in the absence of a showing of actual bias, are not disqualified for service on petit juries in federal criminal prosecutions. *United States* v. *Wood*, 299 US 123; *Frazier* v. *United States*, 335 US 497; *Dennis* v. *United States*, 339 US 162. In *Dennis*, where the rule we have stated was applied, the situation was comparable to the facts here, for the defendant was a prominent leader of the Communist Party charged with contempt of the House Un-American Activities Committee, and the trial was held after the first "Loyalty Order."

(Of course, in any criminal case the accused must be given the opportunity to prove actual bias at the *voir dire* examinations, and to challenge particular government employees for cause, just as he could challenge other prospective jurors for cause.)

The case is *a fortiori* with respect to the presence of government employees on grand juries, which are purely accusatory bodies and do not decide guilt or innocence

as do petit juries, but merely decide whether a person accused should be remanded for trial. And, as we shall show, defendants have traditionally been afforded far more protection from possible bias as to jurors on petit juries than on grand juries.

b. ***Appellant was not entitled to a hearing in order to show that the grand jurors were biased.***

Historically the grand jury is a purely accusatory body. *Hale* v. *Henkel*, 201 US 43, 65; *United States* v. *Remington*, 191 F (2d) 246, 252 (C.A.2), cert. denied, 343 US 907. There is no examination on *voir dire*, as with petit jurors, but the grand jurors take oaths not to allow prejudice to influence their judgment, and that oath has apparently been regarded as a sufficient safeguard.

The Supreme Court has never said what kinds of bias, if any, would disqualify a grand juror or what kind of allegations would require a hearing on the issue. A grand jury in a modern urban community will, in the course of its service, have brought before it a wide variety of crimes and persons. Possibly for that reason, the Supreme Court, instead of speaking in terms of bias, has insisted that grand jury panels be broadly representative of the community, and has struck down indictments returned by grand juries drawn from panels from which particular groups, for example, persons of Mexican ancestry, Negroes, and women, had been deliberately excluded. *Hernandez* v. *Texas*, 347 US 475; *Cassell* v. *Texas*, 339 US 282; *Ballard* v. *United States*, 329 US 187; cf. *Thiel* v. *Southern Pacific Company*, 328 US 217 (wage earners). The emphasis on getting a representative cross-section of the community reflects the historical function of grand juries, to serve as a conduit to report the common knowledge of the community to the courts. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144-145.

In practice the courts have been reluctant to scrutinize grand jury proceedings. See, *Lawn* v. *United States*, 355 US 339, 348-350. This reluctance has stemmed from

the fact that an indictment is merely an accusation, from the hindrance and delay in the administration of criminal justice that would result from adding to the trial of the defendant a trial of the grand jury (see, *United States* v. *Remington*, *supra*, 191 F (2d) at 252), and from the fact that the defendant is guaranteed detailed and elaborate protection, both at the trial and appellate levels, in the proceeding in which his guilt or innocence is determined.

In particular the courts have been reluctant to examine into the beliefs, motives, and prejudices of individual grand jurors, and generally have held that in the absence of a statute, bias on the part of one or more grand jurors does not invalidate an indictment. See, *Cleveland* v. *United States*, 146 F (2d) 730, 733 (C.A.10), affirmed, 329 US 14; *United States* v. *Remington*, *supra*; *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D.N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 300-301 (N.D. Calif.); Annotation, *Prejudice of Members of Grand Jury Against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899.[32]

Even were we to assume, contrary to the holdings of these cases, that an indictment can be challenged on the ground of bias of one or more grand jurors, it will be required that the allegations are specific, individual, and convincing. See, *State ex. rel. Reichert* v. *Youngblood*, 73 N.E. (2d) 174 (Ind.). The affidavit offered by appellant in support of its motion for a hearing stated only general and conclusory allegations that there exists among Government employees *in general* a disposition which prevents them from exercising their unbiased and independent judgment. Such allegations have been rejected as insufficient in regard to petit juries. See, the *Wood*, *Frazier*, and *Dennis* cases, cited *supra*. Even if we should assume *arguendo* that there is some basis for

---

[32] See also the opinion of this Court in *Emspak* v. *United States*, 94 U.S. App. D.C. 378, 203 F (2d) 54,59, reversed on other grounds, 349 US 190; *Quinn* v. *United States*, 91 U.S. App. D.C. 344, 203 F (2d) 20, reversed on other grounds, 349 US 155.

appellant's allegations,[33] there is no showing that any of the Government employees on the grand jury were intimidated or "conditioned" to the extent of disregarding their honest convictions.

What the appellant sought was a general exploration into the motives and beliefs of fifteen or more grand jurors. No court has ever granted such a hearing.[34]

7. Appellant's refusal to comply was deliberate and intentional; and it was criminal within Section 15(a).

In *Townsend* v. *United States*, 68 App. D.C. 223, 95 F (2d) 352, 358; cert. denied 303 US 664, this Court said:

> "It is only in very few criminal cases that 'wilful' means 'done with a bad purpose.' Generally it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law"; citing Judge Learned Hand's opinion in *American Surety Company* v. *Sullivan*, 77 F (2d) 605 (C.A. 2) and *Sinclair* v. *United States*, 279 US 263, 299.

To the same effect see *Quinn* v. *United States*, 349 US 155, 165; and statements in *United States* v. *Murdock*, 290 US 389, 394, and *Screws* v. *United States*, 325 US 91, 96, which quoted *Ellis* v. *United States*, 206 US 246, 257 as stating "the general rule" that, "If a man inten-

---

[33] The law review article relied on by appellant, *Jahoda and Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs*, 61 Y.L.J. 295, was based on interviews with only 70 government employees, and stated that "no attempt [was made] to select a sample of respondents which could be said to be representative of any specified population." (p. 296).

[34] In view of the provisions of Rule 6, Federal Rules of Criminal Procedure, designed to maintain the traditional secrecy of grand jurors' voting and deliberations in order to protect them from just the kind of harassment contemplated by the appellant, it is unlikely that grand juries are intimidated by the possibility of security proceedings or pressures of any kind against them so that they will violate their responsibilities.

tionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

An "evil" intent as distinguished from the deliberate intent to disregard or violate the law is seldom required, save in cases involving fraud (*Wilson* v. *United States*, 250 F (2d) 312, 319 (C.A.9)), and in cases of offenses derived from the common law, like larceny. See, *Morrisette* v. *United States*, 342 US 246.

The language of Section 15(a) affords no basis for implying a requirement of an "evil" intent or a "specific intent" within cases like *Scales* v. *United States*, 367 US 203. Sections 7 (a) and 15(a), taken together, make up a straightforward requirement of registration when ordered by the Board and a penalty for disobedience. Section 15 (a) does not even use the word "willful."

On the uncontradicted facts, appellant deliberately and intentionally refused to register. Appellant knew of the order and appellant knew what it was doing, and its conduct violated Section 15(a). Cf., *United States* v. *Gibas*, 300 F (2d) 836, 840; and *Ellis* v. *United States*, *supra*. If a deliberate failure to refuse to comply is "evil," then appellant's intent was "evil", in the only sense in which that word could possibly apply in this case.

Appellant suggests that it was not guilty if it and its officers believed in good faith that they had a constitutional privilege not to register. On such a theory Section 15 (a) could be applied only to organizations and persons who approved of the statute and believed it to be constitutional, which is an absurd result and one plainly at variance with the purpose of the Act. Appellant and its officers knew the facts, and they knew that the Supreme Court had held the registration requirement constitutional. The answer to appellant's contention is to be found in *Reynolds* v. *United States*, 98 US 145, 167:

> "Every act necessary to constitute the crime was knowingly done, and the crime was therefore know-

> ingly committed. Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law. The only defense of the accused in this case is his belief that the law ought not to have been enacted."

And see, *Sinclair* v. *United States*, 279 US 263, 299.

8. The form of "registration statement" is not vague

Appellant's final argument, addressed to Count XII is that in the form of registration statement the questions as to the number and names of its members and the description, location, and possession of printing devices "are extravagantly vague and impossible to comply with." [35] Therefore, it argues, it cannot be punished for failing to execute other parts of the statement, citing *Bowman Dairy Co.* v. *United States*, 341 U.S. 214.

The argument does not seem to square with Gus Hall's statement that "In no way do we intend to comply with the law" (J.A. 35), which expressed an attitude of defiance, not inability to comply. And the factual basis asserted for the argument, that appellant can not know who its members are or what printing and duplicating devices its "members, affiliates and associates" have, does not exist.

It is not the law that every person who comes within any of the "criteria" in section 5 of the Communist Control Act, 50 U.S.C. 844, is a member of the Party or that every person who has the necessary "subjective attitude" may be held to be a member, though appellant never heard of him and does not regard him as a member. The "criteria" are merely statements of fact situations which may constitute evidence on the basis of which a finding of membership *may* be made. Obviously there is a rational connection between the various criteria, such as attendance at meetings, participating in the organization's activities, and so on, and Party membership, and equally obviously attendance at any meeting or confer-

[35] The questions are numbers 11 and 12 on Form IS-51 and appear on pages 61 and 62 of the Joint Appendix.

ring with any member do not in every instance *require* a finding of membership. And appellant ignores the fact that the instructions to the jury approved in *Killian* v. *United States*, 368 U.S. 231, included the statement that "there must be present the desire on the part of the individual to belong to the Communist Party and *a recognition by that Party that it considers him as a member*" (368 U.S. at 247n.) (emphasis added).

This Court rejected a similar attack to the effect that the evidentiary considerations set out in Section 13(e) of the Act (50 U.S.C. 792(e)) were vague in *Communist Party* v. *Subversive Activities Control Board*, 96 U.S. App. D.C. 66, 223 F. 2d 531, at 558-560.

All that Form IS-51 requires in the way of answers is that appellant state the number and names of the persons it considers to be members. That is not vague at all, and requires no more than a good faith effort at compliance.

Similarly, with the question as to the description, location, and so on, of printing devices, it will not be a "willful" false statement if appellant answers as fully as it can and in good faith.

See, *Jordan* v. *DeGeorge*, 341 U.S. 223, 231; *United States* v. *Ryan*, 128 F. Supp. 128 (S.D.N.Y.), S.C. 350 U.S. 299.

On the law, the *Bowman Dairy* case, cited by appellant, is clearly distinguishable. As the Supreme Court said more recently in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 224, that case [*Bowman*] "cannot be considered apart from its facts." The attorney who was the subject of the contempt citation in *Bowman* was subject to conflicting obligations, the order of the Attorney General not to produce and the district court's order to produce. The facts were entirely different from the facts here, where the appellant deliberately refuses to comply, and the difference is one that could properly be weighed in deciding whether to impose punishment.

In *St. Regis* the Court took that very difference into account, and said that "this is not 'a case involving single

oversight or an honest mistake in a good faith attempt to comply with the Commission's order' ", quoting the opinion of the Court of Appeals. And the Court of Appeals in that case had reversed the district court's refusal to impose the penalties, because the company had "refused to accede to many of the Commission's requests on the sole ground that the Commission had no authority to demand what was requested" (*United States* v. *St. Regis Paper Co.*, 285 F. 2d 607, at 614 (C.A. 2), saying that the fact that "the respondent's recalcitrance was caused by a wrong guess on a disputed question of law does not prevent it from being held to 'lawful consequences attached to the refusal.' "

See also, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 653. And the rule is the same in a criminal case. *Sinclair* v. *United States*, 279 U.S. 263, 299.

The appellant's assertion that the questions in the registration form were vague being erroneous as a matter of fact and its refusal to comply in any respect being intentional, the conviction on Count XII was proper.

Conclusion

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

J. WALTER YEAGLEY
Assistant Attorney General

KEVIN T. MARONEY
GEORGE B. SEARLS
LEE B. ANDERSON

Attorneys, United States
Department of Justice
Washington 25, D.C.

Attorneys for Appellee

April, 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 683943 1093

JOINT APPENDIX

IN THE

United States Court of Appeals

For the District of Columbia Circuit

No. 17,583

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Appellant,

v.

THE UNITED STATES OF AMERICA,

Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

CLERK

INDEX

Indictment

(Filed December 1, 1961)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impaneled on November 2, 1961,

Sworn in on November 7, 1961

Criminal No. 1010–61

Grand Jury No.

Violations: 50 U. S. C. 786 and 794

THE UNITED STATES OF AMERICA,

v.

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA.

The Grand Jury charges:

COUNT I

1. That all times mentioned herein the Communist Party of the United States of America, herein indicted and made the defendant, was an unincorporated association having its principal headquarters within the City of New York and has been an "organization" as defined in 50 U. S. C. 782 (Section 3 of the Subversive Activities Control Act of 1950, 50 U. S. C. 781, et seq., hereinafter referred to as the "Act").

2. That on or about April 20, 1953, the Subversive Activities Control Board, after hearings on a petition filed by the Attorney General of the United States pursuant to Section 13(a) of the Act, issued its findings concluding the Communist Party of the United States of America, the defendant herein, to be a Communist-action organization within the meaning of the Act, and ordered the said Communist Party of the United States of America to register with the Attorney General in the manner prescribed by Section 7 of the Act. The aforesaid order of the Subversive Activities Control Board became final, pursuant to the provision of Section 14(b)(4) of the Act, on October 20, 1961 and notice to that effect was published in the Federal Register on October 21, 1961.

3. That the Communist Party of the United States of America was thereby required by the said final order of the Subversive Activities Control Board and by the Act to register and file a registration statement as a Communist-action organization with the Attorney General on or before November 20, 1961.

4. That at no time up to and including the return of this indictment has the Communist Party of the United States of America registered and at no time has it filed a registration statement with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by the Act.

5. That the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States on or before November 20, 1961, in the District of Columbia and within the jurisdiction of this court, as a

Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT II

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 21st day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT III

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 22nd day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT IV

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 23rd day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT V

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 24th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT VI

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 25th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

Count VII

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 26th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

Count VIII

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 27th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a

Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT IX

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 28th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT X

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 29th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT XI

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That on the 30th day of November, 1961, the Communist Party of the United States of America, the defendant herein, willfully and unlawfully failed to register with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, as a Communist-action organization as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

COUNT XII

The Grand Jury realleges all of the allegations contained in paragraphs 1, 2, 3, and 4 of the first count of this indictment.

1. That the defendant, the Communist Party of the United States of America, from on or about November 20, 1961 and continuously thereafter to the day of the return of this indictment has willfully and unlawfully failed to file with the Attorney General of the United States, in the District of Columbia and within the jurisdiction of this Court, a registration statement as required by Section 7 of the Act.

In violation of 50 U. S. C. 786 and 794.

Motion to Dismiss Indictment

(Filed January 5, 1962)

The defendant moves to dismiss the indictment and each of its counts on the following grounds:

1. The statutory provisions on which the indictment is based, 50 U. S. C. 786 and 794, on their face and as applied, violate the Fifth Amendment privilege against self-incrimination of defendant's officers and members, which privilege defendant hereby claims and asserts on their behalf.

2. 50 U. S. C. 786 and 794, on their face and as applied, otherwise violate the Constitution, including the First, Fifth, Sixth and Eighth Amendments, Art. I, sec. 9, cl. 3, and Art. III, sec. 2, cl. 3.

3. The indictment and each of its counts do not state facts sufficient to constitute an offense against the United States.

4. The regulations and forms prescribed by the Attorney General for the registration of, and the filing of registration statements by, Communist-action organizations are not authorized by law and are contrary to law.

5. The indictment was not found by a properly constituted grand jury or by a sufficient number of qualified and unbiased grand jurors, for the reason that thirteen of the twenty-three grand jurors were employees of the federal government and two others were retired employees of the federal government.

In support of paragraph 1 of this motion, defendant refers to the annexed affidavit of John J. Abt. In support of paragraph 5 of this motion, defendant refers to the Affidavit and Offer of Proof of Joseph Forer, filed herewith.

Affidavit of John J. Abt, in Support of Motion to Dismiss Indictment

(Filed January 5, 1962)

DISTRICT OF COLUMBIA, ss.:

JOHN J. ABT, being duly sworn, deposes and says as follows:

1. I am one of the attorneys for the defendant in the above action and have represented the defendant throughout the administrative and judicial proceedings which eventuated in the final order of the Subversive Activities Control Board, referred to in the indictment.

2. On November 10, 1961, the defendant, the Communist Party of the United States, mailed a letter by registered mail to the Assistant Attorney General, Internal Security Division, Washington 25, D. C. A true copy of this letter is attached hereto marked Exhibit A.* This letter was received in the Internal Security Division of the Department of Justice on November 11, 1961 as evidenced by the return registry receipt.

3. On November 17, 1961, J. Walter Yeagley, Assistant Attorney General, Internal Security Division, sent a telegram to the defendant, a true copy of which is attached hereto, marked Exhibit B.* This telegram was received by the defendant on November 18, 1961.

s/ JOHN J. ABT.

Subscribed and sworn to before me this
15th day of December, 1961.

s/ MARY E. ROSENTHAL
Notary Public
My Commission Expires August 31, 1964

---

* [These exhibits are not printed here. They are the same as Exhibits A and B to G. Exhibit 4, printed *infra*.]

Motion for Hearing on Qualifications of Grand Jurors

(Filed January 5, 1962)

The defendant moves that a hearing be held for the purpose of inquiring into the qualifications of the members of the grand jury which returned the indictment herein.

As grounds for this motion, defendant states:

(1) Thirteen of the twenty-three members of the grand jury were government employees and two others were retired government employees, including three employed by the Army Department, one retired from employ of the Army Department, and one each employed by the State Department, the Naval Research Laboratory, and the Special Assistant to the President for Science and Technology. Still other members may have been spouses, parents or children of government employees.

(2) Defendant desires the opportunity to establish at the hearing that the grand jurors referred to were, by reason of their governmental connections, unsuitable grand jurors and biased in this case personally and as a class, and that, as a result of their presence, the grand jury was not an independent body for the purpose of determining whether to indict the defendant but instead was for that purpose under the domination and control of the prosecution.

If the hearing sought is denied, defendant moves for a hearing for the purpose of interrogating the government employees (including the retired employees) on the grand jury to determine if they were personally biased against defendant or unable to exercise an independent judgment in this case.

In support of this motion petitioner refers to the annexed Affidavit and Offer of Proof, executed by Joseph Forer.

Affidavit of Joseph Forer, and Offer of Proof in Support of (1) Paragraph 5 of Motion to Dismiss Indictment, (2) Motion for Hearing on Qualifications of Grand Jurors, and (3) Challenge for Cause to Petit Jurors and Motion for Hearing on Qualifications

(Filed January 5, 1962)

DISTRICT OF COLUMBIA, ss.:

JOSEPH FORER, being duly sworn, deposes and says:

1. I am counsel for the defendant in this case, together with Mr. John J. Abt.

2. At my request, the office of the Clerk of the Court furnished me with a list of the members of the grand jury which returned the indictment in this case. The list shows the employment of the grand jurors. A copy of this list is attached hereto, marked Exhibit A.

3. As appears from Exhibit A, thirteen of the twenty-three members of the grand jury were government employees and two others were retired government employees. These include employees of sensitive agencies, three being employed by the Army Department, one retired from the employ of the Army Department, and one each employed by the State Department, the Naval Research Laboratory, and the Special Assistant to the President for Science and Technology. Still other members of the grand jury may have been spouses, parents or children of government employees.

4. I believe, and the defendant therefore offers to prove, if granted the opportunity to do so, that the government employees and retired government employees on the grand jury, personally and as a class, were biased in this case against the defendant, and that as a result of their presence, the grand jury was not an independent body for the

purpose of determining whether to indict the defendant, but instead was for that purpose under the domination and control of the prosecution. I also believe, and the defendant therefore offers to prove, if granted the opportunity to do so, that government employees and retired government employees as a class would be unsuitable and biased petit jurors in this case.

5. My belief is based on the following matters:

(a) The indictment charges the defendant with wilfully failing to register itself as a seditious agent of the Soviet Union.

(b) For at least several years it has been an official, basic policy of the executive and legislative branches of the government that the defendant is an enemy of the nation and that it is a seditious agent of the Soviet Union. This view has been expressed on innumerable occasions by leading figures in the government, including the government's chief investigator, the Director of the Federal Bureau of Investigation. Any government employee who would take issue with this view or who would express sympathy or open-mindedness toward the defendant would undoubtedly be in jeopardy of losing his job and of being subjected to investigation by Congressional committees and abuse by numerous members of Congress and of the public generally. It is public knowledge that many high government figures, including the President of the United States, members of the Supreme Court, and General Marshall, have been extravagantly attacked for actions irrationally considred to be sympathetic to Communism, and that a public campaign on such a basis has been mounted to impeach the Chief Justice of the United States.

Affidavit of Joseph Forer, and Offer of Proof in Support of (1) Paragraph 5 of Motion to Dismiss Indictment, (2) Motion for Hearing on Qualifications of Grand Jurors, and (3) Challenge for Cause to Petit Jurors and Motion for Hearing on Qualifications

(c) An entire state of mind has been engendered in government employees which is incompatible with their being impartial jurors in this case. Fear of loss of employment and public invidium is only part of this state of mind. The discipline which government employees are under, the expressed sentiments of their superiors in office, the attitude of their associates, the governmental policies they effectuate, all inevitably create a disposition which prevents them from exercising an independent judgment as grand or petit jurors in this case and which disables them from fulfilling in this case the historic role of the grand jury "to stand between the prosecutor and the accused."

(d) By reason of the government's loyalty-security program for federal employees, the pressures exerted by Congress, the press and influential segments of the public, and the general climate of opinion, federal employees as a class are unable to pass fearless and unbiased judgments in this case, and are psychologically disabled from disagreeing with the accusations placed before them by the government prosecutors. Indeed, most federal employees would fear that if they disagreed with such accusations they would themselves become suspect and subject to investigation. These conclusions are corroborated by persons who have expert qualifications to judge the impact on federal employees of the matters referred to, including the following: Dr. Marie Jahoda, a professional social psychologist who has made a study in this field with Dr. Stuart W. Cook, published as *Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs,* 61 Yale L. J. 295; and Gerhard P. Van Arkel and Joseph A. Fanelli, whose respective views and

conclusions are contained in their affidavits filed in this Court in the case of *United States* v. *Martin Popper*, Criminal No. 1053-59.

(e) Because of the pervasive extent of the government's crusade against Communism and the Communist Party, I believe it is readily possible that some of the grand jurors in this case may have participated in anti-Communist activities as part of their government work. This possibility is magnified by the fact that some of them were employed by, or retired from the employment of, sensitive agencies.

6. If the defendant is given an opportunity to do so, it will offer evidence of such of the above matters as are not already of record in this case or the subject of judicial notice. Among the witnesses it will call will be the grand jurors, whom it desires to question concerning the existence of personal bias against the defendant; government officials administering loyalty and security programs; and experts qualified to testify concerning the attitude of federal employees as a class if called to act as jurors in a case of this sort.

s/ JOSEPH FORER.

Subscribed and sworn to before me this 26th day of December, 1961.

s/ MARY E. ROSENTHAL
Notary Public
My Commission Expires August 31, 1964

Exhibit A

NOVEMBER 1961 GRAND JURY

1.	Miss Dorothy M. Albright	Govt.	53	1900 F St., N.W. Secretary, Pub. Hous. Adm.
2.	Mrs. Edith M. B. Ayers		68	4106 38th St., N.W. Housewife.
3.	Miss Mary R. Barry	Govt.	42	2355 Nebraska Ave., N.W. Adjudicator, State Dept.
4.	Burley V. Brown	Govt.	57	714 55th St., N.E. Lock maker, US Post Office.
5.	Mrs. Nadine B. Buchanan		69	121 Peabody St., N.W. Retired from Internal Revenue Bureau
6.	John A. Croarkin	Govt.	37	2325 42nd St., N.W., Apt. 405 Electronic Eng., Army Dept.
7.	Thomas A. Curran	Govt.	68	3176 Westover Dr., S.E. Head Electrician, Senate Ofc. Bldg.
8.	Alejandrino Dumlao	Govt.	52	634 Chesapeake St., S.E. Warehouseman, Naval Research Lab.
9.	Mrs. Mary J. Estes		65	1629 Columbia Rd., N.W. #202 Housewife.
10.	Miss Irma E. Ferguson	Govt.	52	2022 Columbia Rd., N.W., #706 Adm. Ofcr. Army Dept.
11.	Mrs. Vivian M. Graff	Govt.	37	2845 Northampton St., N.W. Records Mgmt. Offcr., Spec. Ass't. to the President for science & technology, White House.

12. William J. King		54	1223 Md. Ave., N.E. House painter, self-employed.
13. Homer D. Knicely		46	1327 Hemlock St., N.W. Ofc. Mgr., Union Beauty & Barber Supply Co.
14. Lorenzo Knight	Govt.	42	1841 M St., N.E. #4 Mail Clerk, Development & Loan Fund.
15. John F. Lynch	Govt.	65	1660 Park Rd., N.W., #3 Procurement Offer. Post Office.
16. John L. McCloskey		72	2222 I St., N.W. Retired Engineer.
17. Robert E. Odell	Govt.	35	1801 Clydesdale Pl., N.W., #716 Industrial Engr. Army Ordinance.
18. Mrs. Elizabeth W. Palmer	Govt.	70	3220 Conn. Ave., N.W. #115 Payroll Clerk, Govt. Prntg. Ofc.
19. Mrs. Pearl M. Ratte		47	3926 Southern Ave., S.E., #302 Clerk, Advocate Magazine.
20. William C. Russell	Govt.	55	228 Tenn. Ave., N.E. Operating Eng., G.S.A.
21. Earl W. Tyler, Jr.		41	1506 Dumbarton Rock Ct., N.W. Exec. Vice Pres. & Gen. Mgr. Lanman Engraving Co.
22. Miss Helen P. Webster		57	2743 4th St., N.E. Retired—Army Dept.
23. Frederick L. Wormald		49	2136 Leroy Pl., N.W. Associate Director, Association of American Colleges.

Clerk's Entry of Denial of Motions

(Filed October 12, 1962)

On this 12th day of October, 1962, came the attorney for the United States; the defendant by its attorneys, Joseph Forer, Esquire, and John Abt, *pro hac vice;* whereupon the defendant's motion to dismiss the indictment; and for a hearing on the qualifications of Grand Jurors; and to challenge for cause the Petit Jurors, coming on to be heard, after argument of counsel, are denied by the Court.

By direction of

EDWARD M. CURRAN
Presiding Judge
Criminal Court #One

HARRY M. HULL, Clerk

By s/ Tom McGuire
Deputy Clerk

Excerpts from Trial Proceedings

[1] Washington, D. C.
December 11, 1962.

The above cause came on for trial before THE HONORABLE ALEXANDER HOLTZOFF, Judge, United States District Court for the District of Columbia, and a jury, commencing at 1:45 p.m.

* * *

[4] The Court: Before the jury panel is brought into the courtroom the Court wishes to state, in order that there might be a proper record of the matter, that at a conference in chambers both counsel agreed that no Government employees should be included in the panel, and the Court has instructed the jury clerk, in preparing the jury panel for this case, to omit names of Government employees.

The Court understands that Government counsel do not concede that Government employees are not eligible to serve in this case, but that in order to avoid any future controversy they are consenting that this be done; and, of course, it is the view of the Court that Government employees are not ineligible to serve in any case whatever, but in view of the [5] agreement of both counsel the Court has arranged for such a jury panel.

You may bring in the jury panel, please.

* * *

[6] Mr. Maddrix: Ladies and gentlemen of the panel: My name is Maddrix.

This is a criminal charge brought by the United States of America against the Communist Party of the United States of America. The charges are embodied in an indictment. The indictment contains twelve counts. The first eleven counts of the indictment charge that the defendant, the Communist Party of the United States, wilfully and unlawfully failed to register with the Attorney General of the United States as a communist action organi-

zation, in violation of Title 50 of the U. S. Code, Section 786; and the twelfth count of the indictment, which is a little different, charges that the defendant wilfully and unlawfully failed to file a [7] registration statement with the Attorney General of the United States, in violation of the same section of the Act.

* * *

[8] The Court: Very well. Ladies and gentlemen, the Court is going to propound a number of questions to you and will every juror please listen carefully to every question asked and answer those that may be applicable to him or her.

Are there any of you ladies and gentlemen who have heard or know about this case? If so, will you please rise. Will you come forward, please.

Will you state your name, sir?

Prospective Juror Einhaug: Karl A. M. Einhaug.

The Deputy Clerk: Karl A. M. Einhaug, Juror 29, the middle of the first page.

The Court: How do you derive your knowledge of this case, sir?

Prospective Juror Einhaug: I read about it in the paper yesterday, there should be a case. That is all.

The Court: Have you formed any opinion or views concerning the case?

Prospective Juror Einhaug: No, sir.

The Court: Can you lay aside everything that you have read about it and decide this case solely on the evidence if you were selected to serve on this jury?

Prospective Juror Einhaud: Beg pardon, sir?

The Court: Thank you.

[9] Will you state your name, please, sir?

Prospective Juror Posniak: Edward G. Posniak.

The Deputy Clerk: Juror 75, the top of page 1, Edward G. Posniak.

The Court's Questions to Prospective Jurors

The Court: How do you derive your knowledge of this case, sir?

Prospective Juror Posniak: From the newspaper.

The Court: Have you formed any opinion concerning it?

Prospective Juror Posniak: I have formed some opinions based on similar cases with similar indictments.

The Court: Would you be able to lay aside everything that you have read or any opinion that you may have formed and decide this case solely on the evidence to be introduced at this trial if you were selected to serve on this jury?

Prospective Juror Posniak: I am not sure that I could, Your Honor.

The Court: I see. Very well. You may resume your seat.

Mr. Smithson: Your Honor, may I address the Court?

The Court: Yes.

Mr. Smithson: In view of the reluctance of the prospective juror, or his statement that he would be unable to set aside some possible preconceived opinion, I would ask the [10] Court to excuse him.

The Court: You mean you are challenging him for cause?

Mr. Smithson: I believe yes, your Honor.

The Court: I will sustain a challenge for cause.

* * *

The Court: Is any one of you acquainted with any of the witnesses whose names were announced? If so, will you please rise.

The Government is represented in this case by Mr. Frederick G. Smithson, an Assistant United States Attorney, who has just risen from his seat at the Government counsel table. Is any one of you acquainted with him? If so, please rise.

Defendant's Requested Questions on Voir Dire

Other Government counsel are Mr. F. Kirk Maddrix, of the Department of Justice, who has just risen from his seat. Is any one of you acquainted with Mr. Maddrix?

The third Government counsel is Mr. Robert L. Keuch, who has just risen from his seat. Is any one of you acquainted with Mr. Keuch?

Counsel for the defendant are Mr. Joseph Forer, who has just risen from his seat at the defense counsel table, and Mr. John Abt. Is any one of you acquainted either with [11] Mr. Forer or Mr. Abt?

Does any one of you know of any reason why you cannot fairly and impartially decide the issues of this case solely on the evidence to be introduced at this trial if you were selected to serve on this jury?

* * *

DEFENDANT'S REQUESTED QUESTIONS ON VOIR DIRE

1. Do any of you hold any feeling of ill-will or hostility toward the Communist Party of the United States?

2. Have any of you ever said or written anything derogatory about or hostile to the Communist Party?

3. Do any of you believe that the Communist Party is an enemy of this country?

4. Do any of you believe that the Communist Party is a subversive organization?

5. Do any of you believe that the Communist Party is a threat to the safety or well-being of yourself or your family?

6. Have any of you formed any opinion as to the guilt or innocence of the defendant in this case, the Communist Party?

* * *

Defendant's Requested Questions on Voir Dire

8. Have any of you ever read, seen or heard anything unfavorable or derogatory about the Communist Party?

9. Would the fact that a person is an officer of the Communist Party in itself cause you to have some doubt as to his truthfulness?

10. Would you have a doubt of the truthfulness of a statement made by the Communist Party simply because of the fact that it was the Communist Party which made the statement?

11. Have any of you ever been the subject of a government loyalty or security investigation?

12. Have any of you ever been employed by the Federal Bureau of Investigation, or any other branch of the Department of Justice, or any other law enforcement or police agency?

13. Are any of you employed in a plant or business whose employees are subject to government security clearance?

14. Are any of you applicants for government employment?

15. Are any of you applicants for employment which would require government security clearance?

16. Is any member of your immediate family (a) a government employee, or (b) an applicant for government employment, or (c) employed by a plant or business whose employees are subject to government security clearance?

17. Have any of you ever testified before, or given information to, the House Committee on Un-American Ac-

tivities, the Senate Internal Security Sub-Committee, or any other committee or agency engaged in investigating Communism?

18. Have any of you ever supplied information regarding the Communist Party or Communists to the Federal Bureau of Investigation or any other law enforcement or police agency?

19. Are any of you related to or acquainted with:

(a) Any past or present member or employee of the House Committee on Un-American Activities or the Internal Security Sub-Committee or any other committee engaged in investigating Communism?

(b) Any person who has given information about the Communist Party or Communism to the Federal Bureau of Investigation, any other police or law enforcement agency, or any legislative committee?

(c) Any person employed by the Federal Bureau of Investigation, any other branch of the Department of Justice, the office of the United States Attorney, or any other law enforcement or police agency?

20. Have any of you ever read any books or articles on the subject of Communists or Communism by: J .Edgar Hoover, Elizabeth Bentley, Whitaker Chambers, Herbert Philbrick, Louis Budenz, J. B. Matthews, Ralph De Toledano, William Buckley, Gerald L. K. Smith?

21. Do any of you subscribe to any of the following publications: The National Review, Human Events, Exclusive, Economic Council Letter, Dan Smoot's Report, American Mercury, Right, The Cross and the Flag, Valor, Over Here, Counterattack, Inform, The American Legion

Firing Line, Freedom's Facts Against Communism, Behind the Communist Line, American Nationalist, Closer Up, The Virginian, Common Sense, Don Bell Reports, The Revere, Grass Roots, Task Force, Williams' Intelligence Summary, Women's Voice?

22. Have any of you ever been or are you now a member of or contributor to any of the following organizations: John Birch Society, Ku Klux Klan, American Legion, Nazi Party of America, Young Americans for Freedom, Americans for Constitutional Action, Veterans of Foreign Wars, Daughters of the American Revolution, Christian Anti-Communist Crusade, American Coalition of Patriotic Societies, Minute Women of the U. S. A., American Flag Association, U. S. Day Committee, National Renaissance Party, American Education Association, We the People, American Public Relations Forum, Guardians of Our American Heritage, For America, Pro America, Christian Crusade?

23. Aside from the organizations just named, have any of you ever been or are you now a member of or contributor to any organization or group which has as one of its major policies a policy of antagonism or hostility toward the Communist Party?

24. Do any of you regularly listen to any of the following radio programs: Fulton Lewis, Jr., Life Line, John T. Flynn's American Future, Clarence Marion's Forum?

25. Would any of you be embarrassed in any way or encounter any difficulties or problems in your employment, occupation, social or political relationships if you should vote to acquit the defendant, the Communist Party, and the fact that you so voted became publicly known?

Defendant's Requested Questions on Voir Dire

26. Would any of you have any difficulty or problem in giving to the Communist Party the benefit of the rule of law that a defendant is presumed innocent unless proved guilty beyond a reasonable doubt?

* * *

28. Have any of you ever served on a grand jury which investigated Communist activity?

29. Have any of you served on any grand jury within the last five years?

30. Do you know of any reason why you should not serve as a juror in this case?

31. Are any of you employed by the United States or District of Columbia government? If so, of which agency?

[13] The Court: I am not going to ask No. 1.

You must realize this, gentlemen, that every person in the United States, or most people in the United States who are not either members of the Communist Party or sympathizers with it are opposed to it. It is like in a murder case, everybody is opposed to murder, but that does not disqualify people opposed to murder from sitting as a juror.

* * *

[14] The Court: I am not going to ask 1, 2, 3, 4 or 5.

Well, No. 6 I am perfectly willing to ask, although I think that is repetitious.

Mr. Maddrix: We think that has been covered.

The Court: I think that has been covered.

No. 8 is an impossible question because everybody who knows how to read at times has read something derogatory about the Communist Party.

Mr. Abt: These are preliminary questions, Your Honor, which might be followed up in order to determine whether that fact—

The Court: But everybody would have to answer yes, unless a person is illiterate.

Mr. Forer: That is right, but we would like to know what it is that they were reading.

The Court: Well, I think No. 9 is proper.

I think No. 10 is proper.

• • •

[16] Now, No. 11, a lot of people might have been the subject of a government loyalty or security investigation without knowing it.

Mr. Forer: Well, to your knowledge.

Mr. Maddrix: That is right.

The Court: And also I do not want to embarrass prospective jurors by having them stand up and say I have been investigated as to my loyalty. I do not see any reason for that. I could understand it better if the Government asked for the question.

Mr. Maddrix: Yes.

The Court: I don't think I will ask that.

No. 12 is proper.

No. 13 is proper.

No. 14 is proper.

No. 15 is proper.

No. 16 is proper.

• • •

[18] The Court: Now, about 17, I would see no objection to "Have you ever testified before" these organizations, but "or given information to," I do not like that.

Mr. Smithson: I would object to that.

The Court: Because the law is that an informant has a right to remain secret. I am going to strike out "given information to."

I am going to decline to ask No. 18 for a similar reason.

Now, 19(b) I shall decline for the same reason; (a) I will ask; I think (c) is proper.

I am going to decline to ask No. 20. I am not going [19] to ascertain the extent of reading of any particular juror.

I think No. 21 is proper in view of No. 4 of the Government's questions.

I think No. 22 is proper in view of Government's No. 3.

Well, No. 23 is too vague. I won't ask that.

No. 24, I am not going to ask that. I am not going to ask jurors who their favorite columnists are.

I am not going to ask No. 25 because if I did that I would have to ask the converse, whether they would be embarrassed by finding a verdict of guilty.

Mr. Forer: We would have no objection to your asking the converse, Your Honor.

The Court: I think I better not ask either.

I always decline to ask such a question as No. 26. I instruct the jury as to the degree of proof that is requisite and I assume that my instructions will be followed.

No. 28 is proper, I think; so is 29.

No. 30, I have already covered that.

Mr. Forer: I think so, Your Honor.

• • •

[21] The Court: At the request of counsel the Court will propound certain additional questions to all of the jurors in the courtroom. Will every juror please listen very carefully to every question and answer those that may be applicable [22] to him or her.

Has any one of you or any member of your immediate family, to your knowledge, ever been a member of or had any dealings with any of the following organizations, and if your answer is yes, please rise. Veterans of Abraham Lincoln Brigade, American Committee for Protection of the Foreign Born, Labor Youth League, Civil Rights Congress, Communist Party of U. S. A., Jefferson School of Social Science-New York School for Marxist Studies, Young Communist League, American Peace Crusade, National Council

of American-Soviet Friendship, Nation of Islam. I asume none of you and no members of your immediate families, to your knowledge, have ever been a member or had any dealings with any of those organizations.

Has any one of you ever been employed by or subscribed to or made any contributions to any of the following publications: The Daily Worker—if you have, please rise—The Worker, The Communist, Political Affairs, Morning Freiheit, New Masses, People's World, Masses and Mainstream, National Guardian, or Fair Play. I assume from your silence that none of you have.

Has any one of you ever been a member of or employed by any of the following organizations: If so, will you please rise. International Workers Order, Washington Bookshop Association, Fair Play for Cuba, Southern Conference for Human [23] Welfare, Soviet Government Purchasing Commission.

I think this completes the questions submitted by Government counsel. The Court will now take up the questions submitted by counsel for the defendant.

Would the fact that a person is an officer of the Communist Party in itself and without anything else cause you to have some doubt as to his truthfulness? If so, please rise.

* * *

The Court: Would you have a doubt as to the truthfulness of a statement made by the Communist Party simply because of the fact that it was the Communist Party which made the statement?

[24] Has any one of you ever been employed by the Federal Bureau of Investigation? If so, please rise. Or, by any other branch of the Department of Justice, or by any other law enforcement or police agency? If so, please rise.

* * *

The Court's Additional Questions to Prospective Jurors

Is any one of you employed in a plant or a business whose employees are subject to Goverment security clearance? If so, please rise.

* * *

[25] Is any one of you now an applicant for government employment?

Is any one of you, to your knowledge, an applicant for employment which would require government security clearance?

Is any member of the immediate family of any one of you now a government employee? If so, please rise.

* * *

[31] Is any member of the immediate family of any of you at this time, to your knowledge, an applicant for government employment? If so, please rise.

* * *

[32] Is any member of the immediate family of any one of you, to your knowledge, employed in any plant or business whose employees are subject to government security clearance? If so, please rise.

[33] Has any one of you ever testified before the House Committee on Un-American Activities or the Senate Internal Security Subcommittee or any other committee or agency engaged in investigating communism? If so, please rise.

Are you related—let me change this.

Is any member of your immediate family or a close friend, either a past or a present member or employee of the House Committee on Un-American Activities or the Internal Security Subcommittee or any other committee engaged in investigating communism?

Is any member of the immediate family of any one of you or any close friend employed by the Federal Bureau

of Investigation or by any other branch of the Department of Justice?

* * *

[34] The Court: Is any member of your immediate family or any close friend employed in the Department of Justice or [35] the FBI?

* * *

The Court: Now, is any member of the immediate family or close friend, to your knowledge, employed in the office of the United States Attorney for the District of Columbia?

* * *

[36] The Court: Is any member of your immediate family or any close friend employed by any other law enforcement agency or police agency, to your knowledge? If so, please rise.

* * *

[38] Now, does any one of you subscribe to any of the [39] following publications: If you do, will you please rise as I read the names. The National Review, Human Events, Exclusive, Economic Council Letter, Dan Smoot's Report, American Mercury, Right, The Cross and The Flag, Valor, Over Here, Counter Attack, Inform, The American Legion Firing Line, Freedom's Facts against Communism, Behind the Communist Line, American Nationalist, Closer Up, The Virginian, Common Sense, Don Bell Reports, The Revere, Grass Roots, Task Force, Williams' Intelligence Summary, Women's Voice.

Has any one of you ever been or is now a member of or a contributor to any of the following organizations: And as I read the names of the organizations, if you have been or are a member or contributor to that organization, please rise. John Birch Society, Ku Klux Klan, American Legion, Nazi Party of America, Young Americans for Freedom, Americans for Constitutional Action, Veterans

of Foreign Wars, Daughters of the American Revolution, Christian Anti-Communist Crusade, American Coalition of Patriotic Societies, Minute Men of the U. S. A., American Flag Association, U. S. Day Committee, National Renaissance Party, American Education Association, We The People, American Public Relations Forum, Guardians of Our American Heritage, For America, Pro America, Christian Crusade.

Has any one of you served on any grand—

I am going to ask counsel to come to the bench.

[40] (At the bench:)

The Court: I am going to change my ruling as to Question 28, which reads as follows: Have any of you ever served on a Grand Jury which investigated Communist activity? To ask that question would require a disclosure of secret Grand Jury Proceedings. I shall not ask that question for that reason.

(In open Court:)

The Court: Has any one of you served on any Grand Jury within the past five years? If so, please rise.

This concludes the voir dire examination.

* * *

[44-8] The Court: Ladies and gentlemen of the jury, before this trial starts I would like to remind you that while the trial is in progress you must not discuss this case with anyone, not even at home with members of your families, until after the trial is over, and you must not discuss it even [44-9] amongst yourselves until the trial is finished and the case is submitted to you for final decision. You must not let anyone speak to you about it, and if anyone should try to, you must report the matter to the Court.

In case there are any newspaper articles concerning this trial—and it is not impossible that there might be such—you must not read them while the trial is in progress. This also will apply to any news broadcasts on the radio and television, you must not listen to any of them con-

cerning this trial if there should be any while the trial is in progress.

And, in conclusion, one parting word, keep an open mind until the trial is finished and the case is submitted to you for final decision.

* * *

(Thereupon, at 3:45 o'clock p.m., the trial stood in recess, to reconvene at 1:45 p.m., December 12, 1962.)

* * *

[45] Wednesday, December 12, 1962.

* * *

[61] Mr. Keuch: Before calling any witnesses, we would first like to enter certain of the stipulations referred to in the opening statement.

* * *

The Deputy Clerk: Government's Exhibit No. 1.

[62] (The stipulation was received in evidence and marked Government's Exhibit No. 1.)

* * *

The Deputy Clerk: Government's Exhibit No. 2 marked for Identification.

The Court: You are offering it in evidence?

Mr. Keuch: Yes, sir.

The Court: Let it be admitted.

(The stipulation was received in evidence and marked Government's Exhibit No. 2.)

* * *

[65] Mr. Keuch: This is the third stipulation, your Honor, and I now offer it in evidence.

The Court: Very well, let it be admitted.

The Deputy Clerk: Government's Exhibit No. 3 marked for identification and received in evidence.

* * *

[76] The Deputy Clerk: Government's Exhibit No. 4 marked for identification.

(Document entitled Stipulation, dated November 30, 1962, with attachments A and B, were marked Government's Exhibit No. 4 for identification.)

Mr. Maddrix: We offer this in evidence, your Honor.
Mr. Forer: No objection.

(Government's Exhibit No. 4 heretofore marked for identification, was received in evidence.)

• • •

[81] WILL LISSNER, called as a witness by the Government and, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. Maddrix:

Q. Please state your name. A. My name is Will, W-i-l-l, Lissner, L-i-s-s-n-e-r.

Q. And what is your address? A. 265 Riverside Drive, New York 25.

Q. What is your occupation, Mr. Lissner? A. A newspaper reporter.

[82] Q. For what newspaper? A. The New York Times.

Q. How long have you been with the New York Times? A. Thirty-nine years, sir.

Q. Did you have—strike the question.

Did you go to the Communist Party Headquarters at 23 West—26 West 23rd Street, in New York City, on June the 8th, to attend a press conference? A. Yes, sir, the Communist Party Headquarters at 23 West 26th Street.

Q. 23 West 26th. A. Yes, sir.

• • •

Q. How did you come to go? A. I was assigned to go by the Assignment Editor on a memorandum he had made of a telephone call inviting the Times to send a reporter.

Q. And this building, how many floors does it have? A. As I recall it, it had three floors.

Q. And what floor was this press conference held on, if at all? [83] A. It was held on the third floor, the Headquarters of the National Committee of the Party.

* * *

[84] The Court: Well, who presided at the press conference. Do not put in conclusions.

* * *

A. Mr. Gus Hall.

* * *

[86] Q. What was said by Mr. Hall?

* * *

[87] The Witness: Mr. Hall started out by explaining that he—that "This is to announce an all-out political education campaign, the biggest in all our history."

He was then handing out a statement from the Communist Party, as he said, to save the Bill of Rights.

Mr. Hall then gave his interpretation of the effect on the Communist Party of the decision of the United States Supreme Court just a few days before, December 6th, I think—June 6th, 1961. He said that "Under the Supreme Court decision the Party would be illegal and that thus the United States joins Fascist Portugal, Fascist Spain"—I am quoting [88] his words—"West Germany, the Dominican Islands and South Korea as police states where the Communist Party has been made illegal."

He explained that when a country makes the Communist Party illegal, this makes it a police state.

He said that "The political application of this law would require our Party to commit suicide, and we are not going to cooperate."

He said, "We are not going to be stool pigeons, informers or any such type of character."

He said, "We would rather spend the rest of our days in jail than betray the trust or confidence of a single member or supporter."

And he concluded, after questioning, "In no way do we intend to comply with the law."

By Mr. Maddrix:

Q. Now let me ask you this question: After this press—strike the question.

Who else was at the table there with Mr. Hall, if anyone, during this conference? A. Miss Elizabeth Gurley Flynn, and former councilman Benjamin J. Davis.

• • •

[102] December 13, 1962.

• • •

[107] *Cross-examination by Mr. Abt*:

• • •

[122] Q. Now, Mr. Lissner, do you recall Mr. Hall saying, during the course of that press conference, in substance, that the accusation that the Communist Party is a Communist-Action Organization is what Mr. Hall called the big lie? A. No, sir; he used the term the big lie, but not in reference to that statement.

Q. Do you recall his saying that the charge or accusation that the Communist Party of the United States is a criminal organization that practices sabotage and subversion is, in his words, the big lie? A. Not the phrase you first used, criminal organization. He did not use that. He said the Party has never been convicted of, and then he interrupted himself and said never charged with advocating the violent overthrow of the Government, especially sabotage and subversion.

Q. And didn't he characterize the accusation that it had been so, or that it had been engaged in that kind of conduct, as the big lie? A. Yes, he did.

[123] Q. Do you recall Mr. Hall saying, during the course of that press conference, in substance, that the Supreme Court majority, in its decision of June the 5th, 1961, withheld any decision on the question as to whether the constitutional privilege against self-incrimination was available to the officers of the Communist Party as a reason for their not registering under the law? A. No, sir, he didn't refer to that.

Q. It's your testimony that he did not refer to that? A. No. He did refer in those terms to regulations. He said that the Supreme Court decision did not go into the regulations under the Act.

Q. The Supreme Court decision did not go into the regulations under the Act? A. Yes, sir.

Q. And did he give any further explanation as to what he was referring to by regulations? A. He was referring to the fact that this, in his opinion, raised constitutional questions, and he said that his lawyers would have to go into that. Apparently—he gave us the distinct impression that he had not heard from the lawyers on these questions yet. This was right after the Supreme Court decision.

Q. But he did say, as I understand you now, that the [124] Supreme Court, in its decision, did not go into the regulations under the Act and that these regulations raised serious constitutional questions, is that right? A. Yes, sir.

Q. Didn't he say, if you recall, Mr. Lissner, that the registration provisions of the Subversive Activities Control Act would require the Communist Party to submit the names of its officers to the Attorney General for prosecu-

tion? A. I would like to refresh my recollection by looking at the record. He said that in substance, but it's my present recollection that he did this in answer to a question.

Q. But he did say that in substance? That is your recollection? A. Yes, indeed.

• • •

[125] Q. Do you recall Mr. Hall saying either in his opening remarks or in answer to a question, that the Communist Party is a legal political party, operating within the framework of the Constitution? A. No, sir. He said something that bore on that, but he did not put it that way.

Q. What did he say that bore on that? A. He said that we will fight for every—for the legal open existence of the Communist Party.

Q. We will fight for the legal open existence of the Communist Party? A. And he was referring there to a legal fight.

• • •

[135] Mr. Keuch: Your Honor, at this time we have one more exhibit. This is also a stipulation between the parties.

The Court: Very well, let it be admitted.

The Deputy Clerk: Government's Exhibit No. 11 in [136] evidence.

• • •

Mr. Maddrix: Your Honor, the Government rests, subject, of course, to your in camera inspection of the Grand Jury transcript.

• • •

[137] Mr. Abt: Subject to the same reservation, the defense rests, your Honor.

• • •

[138] Mr. Forer: Thank you, your Honor.

At this time the defendant moves for a judgment of acquittal on each and every one of the counts of the in-

dictment, and I should like to briefly state my grounds in argument toward the motion.

* * *

[168] The Court: Oh, yes.

* * *

[169] For that reason, the motion for a judgment of acquittal is denied.

* * *

[179] December 17, 1962.

* * *

CHARGE TO THE JURY

[233] The Court: Ladies and gentlemen of the jury: Before entering on a discussion of the case on trial, I shall make some preliminary remarks concerning the functions of the Court and jury generally, especially as applied in criminal cases. I shall do so with some degree of particularity and in some detail because it is my information that most of you have not participated in the trial of a criminal case at this term of Court until you were selected to serve on this jury.

Under the system of jury trials that prevails in the Federal Courts it is the function of the Court, that is, it is my function and my duty to instruct the jury in respect to the rules of law that must govern the disposition of the case on trial. You ladies and gentlemen of the jury are bound and obligated to take the law from the Court and to follow the Court's instructions as to the law.

On the other hand, the jury decides the facts. You ladies and gentlemen of the jury are the sole judges of the facts and you must decide the facts yourselves on the basis of the evidence introduced at the trial. The jury decides whether the defendant is guilty or not guilty of the charges on which it is being tried.

[234] In connection with reaching its decision the jury are the sole judges of the credibility of witnesses. In other words, the jury determines whether to believe any witness, the extent to which any witness should be credited, and the weight to be attached to the testimony of any witness. That is an imporant function in those cases as often happens, in which there is a conflict in the testimony. There is no conflict here because the facts are not in dispute. However, it is for the jury to determine what inference to draw from the facts and from the evidence even if there is no dispute as to the facts and to the evidence; and in case more than one inference can reasonably be drawn, the jury decides what inference to draw.

I said to you a moment ago that it is the function and the duty of the Judge to instruct the jury as to the law, but in addition to that the Court has another function to perform in order to aid and assist the jury in reaching its decision as to the facts, and that is to summarize, discuss and comment on the facts and on the evidence to the extent to which the Court deems it desirable to do so. That, however, is done, as I said a moment ago, merely to aid and assist the jury. The Court's summary and discussion and comments on the facts and on the evidence are not binding on you, they are intended only to help you, and you need attach to them only [235] such weight as you deem wise and proper.

In all criminal cases the fact that a defendant has been indicted is not in itself an indication of guilt. An indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Every defendant in a criminal case is presumed to be innocent and this presumption of innocence attaches to the defendant throughout the trial until it is overcome by evidence.

The burden of proof is on the Government to prove the defendant's guilt beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which it is charged the jury must find the defendant not guilty.

Now let me repeat. The burden on the Government is to prove the defendant's guilt beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty. By a reasonable doubt, as its very name implies, is meant a doubt based on reason and not just some whimsical speculation or some capricious conjecture.

Proof beyond a reasonable doubt may be defined as [236] such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

With these preliminary observations I shall pass on to a discussion of the case on trial.

The defendant in this case is the Communist Party of the United States of America. It is on trial on charges that, contrary to the provisions of an Act of Congress, known as the Subversive Activities Control Act of 1950, the Communist Party of the United States of America failed to register as a Communist-Action Organization, and, further, that it failed to file a registration statement required by the provisions of the Act. I shall presently refer to the statute in greater detail.

It now becomes your function to determine whether the defendant is guilty or not guilty of the offenses with which it is charged. Your decision must be reached solely on the evidence, calmly, deliberately, fairly and impartially. You must not be influenced by eloquence or swayed by

oratory or by any feeling or emotion. The only question for you to determine is whether the defendant committed the offenses charged in the indictment. Everything else is extraneous and must be laid to one side. Your attention must be solely [237] concentrated on the narrow question that I have just stated, namely, whether the defendant, the Communist Party of the United States of America, committed the offenses with which it is charged in the indictment.

Some years ago Congress enacted a statute known as the Subversive Activities Control Act of 1950. This statute requires every Communist-Action Organization to register with the Attorney General, and, second, to file a registration statement. The statute, in substance, and I shall paraphrase the definition, defines the term Communist-Action Organization as any organization in the United States which is substantially directed, dominated or controlled by the foreign government or foreign organization controlling the World Communist Movement and which operates primarily to advance the objectives of the World Communist Movement.

This Act of Congress established a Board known as the Subversive Activities Control Board. The function of this Board is to conduct proceedings upon application of the Attorney General, at which evidence is taken and hearings are held, in order to determine whether any organization is a Communist-Action Organization or a Communist-Front Organization and therefore is required to register. It is provided that the Board shall conduct hearings, as I have stated, and also that any party aggrieved by any order of the Board may obtain [238] judicial review in the United States Court of Appeals for the District of Columbia, and the order of the Court of Appeals would, in turn, be subject to review by the Supreme Court of the United States, under certain limitations.

The statute further provides that after any order of the Board finding any organization to be a Communist-Action Organization becomes final it is the duty of that organization then, within 30 days thereafter, to register with the Attorney General and also to file a registration statement.

In other words, an organization that is found to be a Communist-Action Organization must do two things. First, it must register as such an organization by filling out and filing a designated form prescribed by the Department of Justice, and this form is to be filed with the Attorney General. The second step which is to be accomplished at the same time is to file a second form, known as a registration statement. It is really an information statement in which certain information is given. Both of these steps must be taken within 30 days after an order of the Board finding an organization to be a Communist-Action Organization becomes final.

Failure to do either one of these things, that is, failure to register or failure to file a registration statement, is made a criminal offense by the statute.

The statute further provides that in respect of [239] failure to register, each day's failure shall constitute a separate offense.

There is a general rule of law that, in order that a person may be punished for a crime, the crime must have been committed with what the law calls a criminal intent. By that is meant that the defendant must have intended to commit the particular act with which he is charged, or, in this case, with which it is charged, and that it was not done accidentally or inadvertently.

Criminal intent does not mean an evil mind, it merely means that the act was intentional and not inadvertent or accidental.

The fact that a defendant may have thought that he had a right to do the act with which he is charged is not a

defense. So, too, it is no defense that the defendant may have received legal advice to the effect that it had a right to refuse to register. If failure to register was knowing and intentional and not inadvertent or accidental, then the crime is committed, irrespective of what the defendant's mental attitude or purpose or mental operation might have been. It is no defense that he may have thought that he had a right to pursue the course that he did or that he had a legitimate excuse not to comply with the law. If he failed to comply, doing so intentionally, as I have indicated, the crime is [240] committed.

In this case it has been stipulated that the Attorney General brought a proceeding under the statute to which I have referred before the Subversive Activities Control Board to require this defendant, the Communist Party of the United States of America, to register as a Communist-Action Organization. After a series of hearings at which evidence was introduced the Board reached a decision that the Communist Party of the United States of America is a Communist-Action Organization and the Board ordered this organization to register under the Act. The defendant, the Communist Party of the United States of America, then appealed to the United States Court of Appeals for the District of Columbia, and the Court of Appeals affirmed the order of the Board. Then the order was reviewed by the Supreme Court of the United States, and the Supreme Court affirmed the order of the Board.

The order of the Board, as a result of these proceedings in the Court of Appeals and in the Supreme Court, became final on October 20th, 1961. It then became the duty of the Communist Party of the United States of America to register under the Act and to file a registration statement within 30 days after this date, that is, within 30 days after October 20th, 1961.

Now, I want to make it clear to you that you are [241] relieved of any duty, you do not have any duty to determine

whether or not this defendant, the Communist Party of the United States of America, is a Communist-Action Organization, as that has already been adjudicated, that has already been found to be a fact by the Subversive Activities Control Board, and the decision of the Board has been upheld by the Court of Appeals and the Supreme Court. That decision is binding on you and on me. In other words, we start from the proposition that this defendant is a Communist-Action Organization and, therefore, in duty bound to register under the Act and to file the registration statement.

It is stipulated and conceded that the defendant did not register and did not file a registration statement required by the Act.

At this point I shall turn to the indictment in this case. The indictment in this case consists of twelve counts. The first eleven counts charge failure to register on each of eleven days, beginning with the 30th day after the effective date of the order, and the 30th day was November 20th, 1961. As I have said a moment ago, the defendant had 30 days to comply. Each of the first eleven counts, therefore, charges failure to register on one of the eleven days beginning November 20th, there being a separate count for each date, November 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, [242] 29th and 30th. The indictment was returned on December 1st, 1961.

As I said to you before, under the statute failure to register is a separate offense for every day on which there is a failure.

The twelfth count charges failure to file the registration statement required by the Act.

You will bring in a separate verdict on each count, and in each instance the verdict should be either guilty or not guilty.

Evidence was introduced by the Government in support of the contention that the violation of law in this case

was intentional and deliberate and not just inadvertent or accidental. The Government introduced a letter in evidence, dated November 10th, 1961, signed by the Communist Party of the United States, and addressed to the Assistant Attorney General in Charge of the Internal Security Division, in which it was stated that the officers of the Communist Party of the United States and all of its subdivisions declined to sign or to file, or to authorize the signing or filing of, or to supply the information called for by the registration statement or registration form.

You have heard during the trial some contentions raised that to require the defendant to comply with the Act [243] would violate the privilege of its officers against self-incrimination under the Fifth Amendment to the Constittuion of the United States and would also require the Communist Party to confess that it is a Communist-Action Organization. These are matters that do not concern you. They are irrelevant so far as this case is concerned. The fact that the defendant is a Communist-Action Organization has been already determined by the proper authorities and the decision sustained by the Supreme Court of the United States. This Court has ruled that the contentions of the defendant in this respect are erroneous as a matter of law and that no privilege against self-incrimination is involved in this case. This ruling is binding on you.

The Supreme Court of the Unted States has held this statute constitutional. For a number of reasons which I need not trouble you with in detail, I have ruled as a matter of law that the privilege against self-incrimination is not violated by the requirements of the statute or the regulations adopted under the law. While I am not going to summarize all of the reasons which led me to this ruling, this ruling being binding on you and some of my reasons are purely legalistic, I might say to you that one of the principal reasons is that the privilege against self-incrimi-

nation does not apply to corporations, to organizations or to associations, but only to [244] living human beings. Further, the regulation and the form do not require any officer of the organization to sign either the registration form or statement. Consequently, no question of self-incrimination on the part of any of the officers of the defendant organization is involved. You will, therefore, disregard the discussion of the question of the privilege against self-incrimination. This is out of the case. That matter involves a question of law and is not for the jury, and this Court, I repeat, has ruled that the privilege is not violated by the requirements of the Act or of the regulation.

The mere fact that the defendant and its representatives may have thought otherwise, even if their ideas were honestly believed and even the fact that they may have been so advised by their counsel, is absolutely immaterial. A person who acts under a mistaken belief, no matter how honest, as well as a person who consults a lawyer, runs a risk of getting erroneous legal advice. In either event, a person who acts under an erroneous opinion as to his rights or under an erroneous legal advice is not excused from punishment for a criminal offense that he commits knowingly and intentionally, even though he did not realize or did not think that the act that he was doing was criminal.

In conclusion, I want to again repeat that my instructions are binding on you as concerns the law. You are [245] the sole judges of the facts and my discussion of the facts and of the evidence was intended only to help you and is not binding on you.

Summarizing my instructions. I want to repeat that you will find a separate verdict on each of the twleve counts of the indictment. As I said before, the first eleven counts charge violations to register on each of eleven separate days and the twelfth count charges a failure to file a registration statement. In each instance, your verdict should be

either guilty or not guilty; and as of course you are aware, your verdict must be reached by unanimous vote.

Are there any objections or suggestions? If there are any, you may come to the bench.

(At the bench:)

Mr. Forer: Your Honor, we object to the elimination of any element of wilfulness.

The Court: Elimination of what?

Mr. Forer: The element of wilfullness.

The Court: Very well.

Mr. Forer: For reasons which have already been made plain.

* * *

[247] We object to your definition of criminal intent as merely being intentional and not inadvertent, on the ground that as a matter of law there is a greater mens rea required, either a willful—either a bad purpose or along lines indicated, the mens rea indicated in our requested instruction; and, of course, we also object for the same reason to your statements of what is not a defense, namely, that the fact that the officers thought they had a right was not a defense. That ties in with your definition and is contrary to ours.

* * *

We also object to your statements that as a matter of law the privilege against self-incrimination was not violated and that it is irrelevant that the defendant's officers claimed the privilege and—

The Court: Of course, I am not going to let the jury pass upon the privilege of self-incrimination.

Very well, proceed.

Mr. Forer: —as also being not in accordance with [248] law and, in any event, should not have been mentioned to the jury.

* * *

Mr. Forer: On the same grounds we object to your statement that the Act and the regulations do not violate the privilege and that an honest belief to the contrary is immaterial.

The Court: Very well.

Mr. Forer: Finally, Your Honor, we again renew our objections to your failure to give our requested instructions.

The Court: Yes, you renew a separate and individual objection to each individual request.

Mr. Forer: Yes, Your Honor.

• • •

[250] Jury Verdict

• • •

The Deputy Clerk: Mr. Foreman, has the jury agreed upon its verdict?

The Foreman: Yes, it has.

The Deputy Clerk: How do you find the defendant, the Communist Party of the United States of America, on Count 1?

[251] The Foreman: Guilty.

The Deputy Clerk: On Count 2?

The Foreman: Guilty.

The Deputy Clerk: On Count 3?

The Foreman: Guilty.

The Deputy Clerk: On Count 4?

The Foreman: Guilty.

The Deputy Clerk: On Count 5?

The Foreman: Guilty.

The Deputy Clerk: On Count 6?

The Foreman: Guilty.

The Deputy Clerk: On Count 7?

The Foreman: Guilty.

The Deputy Clerk: On Count 8?

The Foreman: Guilty.

The Deputy Clerk: On Count 9?

The Foreman: Guilty.
The Deputy Clerk: On Count 10?
The Foreman: Guilty.
The Deputy Clerk: On Count 11?
The Foreman: Guilty.
The Deputy Clerk: On Count 12?
The Foreman: Guilty.

• • •

[256] The Court: The Court is of the opinion that the maximum fine should be imposed. The Court hereby fines the defendant $10,000 on each count or $120,000 in the aggregate.

• • •

Government's Exhibit 1

STIPULATION

The parties hereto, by their attorneys, stipulate and agree that the defendant, The Communist Party of the United States of America, is, and at all times mentioned in the indictment has been, an unincorporated association having headquarters at 23 West 26th Street, New York City, N. Y.

Dated: November 9, 1962.

Government's Exhibit 2

STIPULATION

The parties hereto, by their attorneys, stipulate and agree as follows:

1. On April 20, 1953, the Subversive Activities Control Board, after hearings on a petition filed by the Attorney General of the United States pursuant to Section 13(a) of the Subversive Activities Control Act of 1950, ordered the defendant herein, the Communist Party of the United States of America, to register as a Communist-action organization under and pursuant to Section 7 of the Act. A true copy of said order of the Board is attached hereto marked Exhibit A.

2. On judicial review, the order of the Board was affirmed by the United States Court of Appeals for the District of Columbia Circuit. The judgment of the said United States Court of Appeals was affirmed by the Supreme Court of the United States, and the mandate of the Supreme Court was issued on October 10, 1961. A true copy of said mandate of the Supreme Court is attached hereto marked Exhibit B.

3. The order of the Board became final pursuant to the provisions of Section 14(b)(4) of the Act on October 20, 1961, and notice to that effect was published in the Federal Register on October 21, 1961. A true copy of said notice as published in the Federal Register is attached hereto marked Exhibit C.

Dated December 6, 1962.

Government's Exhibit 2

(EXHIBIT "A")

BEFORE THE SUBVERSIVE ACTIVITIES CONTROL BOARD

Docket No. 51-101

HERBERT BROWNELL, JR., Attorney General of the United States,

Petitioner,

v.

THE COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

Respondent.

ORDER OF THE BOARD

The Board having this day issued its Report in which it finds and determines that the Communist Party of the United States of America, respondent herein, is a Communist-action organization under the provisions of the Subversive Activities Control Act of 1950;

IT IS ORDERED that the said respondent, the Communist Party of the United States of America, shall register as a Communist-action organization under and pursuant to section 7 of the Subversive Activities Control Act of 1950, and

IT IS FURTHER ORDERED that if the Communist Party of the United States of America fails to comply with the registration requirements of said Act, pursuant to the above Order, then each and every section, branch, fraction, or cell

of said respondent shall register in accordance with the requirements of said Act.

By the Board:

/s/ Peter Campbell Brown
PETER CAMPBELL BROWN, Chairman

/s/ Kathryn McHale
KATHRYN McHALE, Member

/s/ David J. Coddaire
DAVID J. CODDAIRE, Member

/s/ Watson B. Miller
WATSON B. MILLER, Member

Washington 25, D. C.
April 20, 1953

(EXHIBIT "B")

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the United States Court of Appeals for the District of Columbia Circuit.

GREETING:

WHEREAS, lately in the United States Court of Appeals for the District of Columbia Circuit, in a cause between Communist Party of the United States of America, petitioner, and Subversive Activities Control Board, respondent, No. 11850, wherein the judgment of said Court of Appeals was duly entered on the 30th day of July A. D. 1959, as by the inspection of the transcript of the record of the said United States Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari, agreeably to the act of Con-

gress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand nine hundred and sixty, the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, affirmed.

AND IT IS FURTHER ORDERED, That this cause be, and the same is hereby, remanded to the United States Court of Appeals for the District of Columbia Circuit.

June 5, 1961

You therefore, are hereby commanded that such proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorai notwithstanding.

WITNESS, the Honorable EARL WARREN, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and sixty-one.

JAMES R. BROWNING
Clerk of the Supreme Court of
the United States

By J. BLANCHARD
Deputy

No. 12, October Term, 1960

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA,

vs.

SUBVERSIVE ACTIVITIES CONTROL BOARD.

Government's Exhibit 2

(EXHIBIT "C")

SUBVERSIVE ACTIVITIES CONTROL BOARD

[Docket No. 51-101]

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA

Notice of Fact That Order Has Become Final Requiring Registration as a Communist-Action Organization

Attorney General of the United States, Petitioner v. Communist Party of the United States of America, Respondent.

Pursuant to section 13(k) of the Internal Security Act of 1950, 64 Stat. 987, notice is hereby given that the order of the Subversive Activities Control Board, duly issued on April 20, 1953, in accordance with section 13(g) of said Act, requiring the Communist Party of the United States of America to register as a Communist-action organization under section 7 of said Act, became final on the 20th day of October 1961.

SUBVERSIVE ACTIVITIES CONTROL BOARD,
DOROTHY MCCULLOUGH LEE,
Chairman.

[F. R. Doc. 61-10059; Filed Oct. 20, 1961; 8:49 a.m.]

Government's Exhibit 3

(STIPULATION)

The parties hereto, by their attorneys, stipulate and agree as follows:

1. Attached hereto, marked Exhibit A, is a true copy of Order No. 250-61, issued by the Attorney General on October 3, 1961, prescribing regulations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Activities Control Act of 1950. This Order was published in the Federal Register on October 7, 1961, and has been in effect at all times on and after that date.

2. Attached hereto marked Exhibit B is a true copy of Form IS-51a, referred to in Section 11.200 of Exhibit A.

3. Attached hereto marked Exhibit C is a true copy of Form IS-51, referred to in Section 11.201 of Exhibit A.

4. Attached hereto marked Exhibit D is a true copy of Order No. 57-54, issued by the Attorney General on August 27, 1954, prescribing regulations to carry out the provisions of sections 7, 8, 9 and 10 of the Subversive Activities Control Act of 1950. This Order was in effect from August 27, 1954, until superseded by Order No. 250-61, referred to in paragraph 1 of this stipulation.

5. Attached hereto marked Exhibit E is a true copy of Form ISA-1, referred to in Section 11.200 of Exhibit D.

Dated: November 9, 1962.

Government's Exhibit 3

(EXHIBIT B)

Form No. IS-51a Budget Bureau No. 43-R413

(Ed. 9-6-61) Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

REGISTRATION FORMS FOR ORGANIZATIONS

Pursuant to Section 7(a) or (b) of the
Internal Security Act of 1950

(NOTE: THIS FORM SHOULD BE ACCOMPANIED BY A REGISTRATION STATEMENT, FORM IS-51.)

..... hereby registers

as a ..... organization.
("Communist-action" or "Communist-front")

The principal office address of the registrant is .....

.....

Date: .....

It is desirable, but not necessary, that an officer of the Communist organization sign immediately below.

/s/ .....
(Signature) (Date)

.....
(Typed or printed name) (Date)

.....
(Title—type or print)

.....
(Address—type or print)

[If no officer of the organization has signed immediately above, page 2 of this Form must be completed.]

Government's Exhibit 3

The undersigned certifies that he has been authorized by the Communist organization to register the organization with the Attorney General.

/s/ .....
(Signature) (Date)

/s/ .....
(Name) (Date)
(type or print)

.....
(Street address) (type or print)

.....
(City) (State)

(EXHIBIT C)

Budget Bureau No. 43-R302.2
Approval expires July 31, 1966

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.
FORM IS-51

FOR REGISTRATION STATEMENTS OF COMMUNIST-ACTION ORGANIZATION OR COMMUNIST-FRONT ORGANIZATION

INSTRUCTION SHEET—READ CAREFULLY

1. All organizations, corporations, companies, partnerships, associations, trusts, foundations, or other combinations of individuals required to register under Section 7(a) or (b) of the Internal Security Act of 1950 shall use this form for their registration statement.

2. File two copies of Statement. —Two copies of the statement, including any exhibits required, are to be filed.

Government's Exhibit 3

A third copy of the statement and exhibits should be prepared and retained by Registrant for future reference. The statements shall be filed with the Internal Security Division, Department of Justice, Washington, D. C.

3. Answer all items. —All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable", so state. If the space provided on any form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the complete answer given.

4. The registration statement shall be filed in the name of the Communist organization required to register. It is desirable, but not necessary, that the statement be signed by one of the officers of the organization. However, if not signed by an officer, the member, employee, attorney, agent, or other person filing the registration statement of the Communist organization shall certify in writing that he has been authorized by the Communist organization to file the registration statement on its behalf. Such certification shall also set forth the address of the person filing the statement.

5. The making of any willful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

Government's Exhibit 3

Form No. IS-51
(Ed. 7-28-61)

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

REGISTRATION STATEMENT

Pursuant to Section 7(a) or (b) of the
Internal Security Act of 1950

1. (a) Name of Registrant.

(b) Address of principal office.

2. Furnish the following information as to any individual who at any time during the twelve months preceding the execution of this statement was an officer, director, or a person performing the functions of an officer or director of the Registrant:

(a) Name and last known address	(b) Position or office held	(c) Description of duties or functions

3. In the event any of the foregoing individuals listed in answer to question 2 has been known by or has used any other name, furnish as to each the additional name used or by which known.

4. Furnish the following information as to Registrant's receipts and expenditures for the twelve-month period preceding the execution of this statement:

(a) as to amounts received, itemize as follows:

Date funds received	Source from whom received (list name and address)	Amount received

Government's Exhibit 3

(b) as to amounts expended, itemize as follows:

Date payment made	To whom payment was made	Amount of payment	Purposes for which payment was made

5. State the amount of cash on hand or on deposit on the day of the beginning of the twelve-month period preceding the execution of this statement:

6. State the amount of cash on hand or on deposit as of the date of execution of this statement:

7. State the names of all banks or other depositories used by Registrant:

8. List the value of all notes or other evidence of debt owed to the Registrant, including pledges:

9. Furnish the following information as to the liabilities of the Registrant as of the day of the beginning of the twelve-month period preceding the execution of this statement:

Name and Address of creditor	Nature of obligation	Amount of obligation

10. Furnish the following information as to the liabilities of the Registrant as of the date of the execution of this statement:

Name and Address of creditor	Nature of obligation	Amount of obligation

11. If the Registrant is a Communist-action organization:

(a) State total number of members as of date of executing this statement:

(b) File as Exhibit I the name and all other names ever used, as well as the last known address of each individual who was a member of the organization at any time during the period of twelve calendar months preceding the execution of this statement.

12. Furnish the following information concerning any mechanical devices capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership or control of Registrant or its officers, members, affiliates, associates or any group or groups in which the Registrant, its officers or members have an interest.*

Description, make, model and serial number	Where located	Name of owner, or individual or group having custody or control	Relationship to Registrant
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			

* The term mechanical devices includes, but is not limited to, rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines and monotype machines.

Government's Exhibit 3

It is desirable, but not necessary, that an officer of the organization sign immediately below.

/s/ .....
(signature) (date)

.....
(typed or printed name) (date)

. .....
(Title—type or print)

.....
(address—type or print)

[If no officer of the organization has signed immediately above, the following must be completed.]

The undersigned certifies that he has been authorized by the Communist organization to file this registration statement and attached exhibits (if any) with the Attorney General.

/s/ .....
(signature) (date)

/t/ .....
(name) (date)
(type or print)

.....
(street address) (type or print)

.....
(City) (State)
(Type or print)

Government's Exhibit 3

EXHIBIT E

Form approved.
Budget Bureau No. 43-R302

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

FORM ISA-1

FOR REGISTRATION STATEMENTS OF COMMUNIST-ACTION ORGANIZATION OR COMMUNIST-FRONT ORGANIZATION
INSTRUCTION SHEET—READ CAREFULLY

1. All organizations, corporations, companies, partnerships, associations, trusts, foundations, or other combinations of individuals required to register under Section 7(a) or (b) of the Internal Security Act of 1950 shall use this form for their registration statement.

2. File two copies of Statement.—Two copies of the statement, including any exhibits required, are to be filed. A third copy of the statement and exhibits should be prepared and retained by Registrant for future reference.

3. Answer all items.—All items of the form are to be answered. Where the answer to an item is "none" or "inapplicable", so state.

4. Riders shall not be used.—If the space provided on any form for the answer to any given item is insufficient, reference shall be made in such space to a full insert page or pages on which the item number and item shall be restated and the complete answer given.

5. All inserts and documents submitted as a part of any form or statement and all amendments, shall be on good

quality unglazed white paper, 8½ by 13 inches in size. Tables and financial data, however, may be on larger paper, if folded to such size.

6. Both copies of the statement shall be signed. The statement shall be signed by the partners, officers, and directors, including the members of the governing body of the organization. This is a statement to the Government of the United States and any wilful false statement or the omission of any material fact is punishable under 18 U. S. Code, 1001.

Form ISA-1

UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C.

REGISTRATION STATEMENT

Pursuant to Section 7(a) or (b) of the
Internal Security Act of 1950

1. (a) Name of Registrant.

(b) Address of principal office.

2. Furnish the following information as to any individual who at any time during the twelve months preceding the execution of this statement was an officer, director, or a person performing the functions of an officer or director of the Registrant:

(a) Name and last known address	(b) Position or office held	(c) Description of duties or functions

3. In the event any of the foregoing individuals listed in answer to question 2 has been known by or has used any

other names, furnish as to each the additional name used or by which known.

4. Furnish the following information as to Registrant's receipts and expenditures for the twelve-month period preceding the execution of this stateement:

(a) as to amounts received, itemize as follows:

Date funds received	Source from whom received (list name and address)	Amount received

(b) as to amounts expended, itemize as follows:

Date payment made	To whom payment was made	Amount of payment	Purposes for which payment was made

5. State the amount of cash on hand or on deposit on the day of the beginning of the twelve-month period preceding the execution of this statement:

6. State the amount of cash on hand or on deposit as of the date of execution of this statement:

7. State the names of all banks or other depositories used by Registrant:

8. List the value of all notes or other evidence of debt owed to the Registrant, including pledges:

9. Furnish the following information as to the liabilities of the Registrant as of the day of the beginning of the

twelve-month period preceding the execution of this statement:

Name and Address of creditor	Nature of obligation	Amount of obligation

10. Furnish the following information as to the liabilities of the Registrant as of the date of the execution of this statement:

Name and Address of creditor	Nature of obligation	Amount of obligation

11. If the Registrant is a Communist-action organization:

(a) State total number of members as of date of executing this statement:

(b) File as Exhibit I the name and all other names ever used, as well as the last known address of each individual who was a member of the organization at any time during the period of twelve calendar months preceding the execution of this statement.

12. Furnish the following information concerning any mechanical devices capable of being used to produce or publish printed matter or material, which are in the possession, custody, ownership or control of Registrant or its officers, members, affiliates, associates or any group or groups in which the Registrant, its officers or members have an interest.*

---

* The term mechanical devices include, but is not limited to, rotary presses, flatbed cylinder presses, platen presses, lithographs, offsets, photo-offsets, mimeograph machines, multigraph machines, multilith machines, duplicating machines, ditto machines, linotype machines, intertype machines and monotype machines.

Government's Exhibit 3

Description, make, model and serial number	Where located	Name of owner, or individual or group having custody or control	Relationship to Registrant
.....			
.....			
.....			
.....			
.....			
.....			
.....			
.....			

The undersigned certify that they have read the information set forth in this registration statement and the attached exhibit (if any) and are familiar with the contents thereof; that such contents are in their entirety true and accurate to the best of their knowledge and belief. The undersigned further represent that they are familiar with the provisions of Section 1001, Title 18, U. S. Code (printed at the bottom of this form)* and are aware that any wilful

* 18 U. S. C., Section 1001, provides: "Whoever in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

false statement or the wilful omission of any material fact may subject them to liability pursuant thereto.

(Type or print name under each signature)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

....
(Signature) (Date) (Signature) (Date)

Government's Exhibit 4

(STIPULATION)

The parties hereto, by their attorneys, stipulate and agree as follows:

1. On November 10, 1961, the defendant mailed to the Department of Justice by registered mail a letter of which Exhibit A hereto is a true copy. This letter was received by the Department of Justice on November 11, 1961 and by the Internal Security Division of the Department of Justice on November 13, 1961.

2. On November 17, 1961, J. Walter Yeagley, Assistant Attorney General, Internal Security Division, Department of Justice replied to the letter referred to in paragraph 1 hereof by Western Union Telegram, of which Exhibit B hereto is a true copy. The defendant recieved this telegram on November 17, 1961.

Dated November 30, 1962.

(EXHIBIT A)

(PHOTOSTAT)

(See opposite ☛)

EXHIBIT A

45

COMMUNIST PARTY, U. S. A.

23 WEST 26th STREET • NEW YORK 10, N. Y. • MU. 8-5755

November 10, 1961

Assistant Attorney General
Internal Security Division
Washington 25, D.C.

Dear Sir:

This is to advise you that the officers of the undersigned, Communist Party of the United States, and of allof its subdivisions decline to sign, or to file, or to authorize the signing or filing of, or to supply the information called for by a registration statement (Form No. IS-51) or a registration form (Form No. IS-51a) for the undersigned or for any of its subdivisions. The term "officers" for the purposes of this letter includes all those referred to as such in Section 11.205 of 28 Code of Federal Regulations.

These declinations are made by each officer in the exercise of his privilege under the Fifth Amendment to the Constitution not to be a witness against himself. The officers have adopted this means of asserting their respective constitutional privileges because a claim of privilege made in the name of an officer would tend to incriminate him and might constitute a waiver of his privilege.

The undersigned and its officers also hereby inform you that it is their conviction that the Communist Party of the United States is not a Communist-action organization.

On behalf of its members, the undersigned also hereby asserts the constitutional privilege of each of them against self-incrimination by the listing of his name as a member of the undersigned or the furnishing of any of the other information called for by Forms IS-51 and IS-51a.

Your rulings on the foregoing claims of privilege are awaited.

Copies of this letter are being sent to John J. Abt, Esq., and Joseph Forer, Esq., attorneys for the undersigned.

Yours truly,

COMMUNIST PARTY OF THE UNITED STATES

by its authorized officers

COMMUNIST PARTY OF THE UNITED STATES OF AMERICA

Registered Mail,
Return Receipt Requested

CC: Joseph Forer, Esq., 711 - 14th St. N.W., Washington, D.C.
John J. Abt, Esq., 320 Broadway, New York, N.Y.

Government's Exhibit 4

(EXHIBIT B)

WESTERN UNION TELEGRAM

NOV 17 PM 8 36

MSA404 MS-NB455

GOVT PD AR TN PWS WASHINGTON DC 17 742P EST

COMMUNIST PARTY USA
23 WEST 26 ST NYK

EACH AND EVERY CLAIM OF PRIVILEGE IN YOUR LETTER OF NOVEMBER 10 IS HEREBY REJECTED. YOUR LETTER IS ALSO REJECTED AS FULL OR PARTIAL COMPLIANCE WITH THE REGISTRATION REQUIREMENTS OF THE INTERNAL SECURITY ACT OF 1950, THE FINAL ORDER OF THE SUBVERSIVE ACTIVITIES CONTROL BOARD, AND THE PERTINENT REGULATIONS OF THE ATTORNEY GENERAL. YOU ARE ALSO REMINDED THAT A CLAIM OF PRIVILEGE EVEN IF IT WERE VALID IN RELATION TO ANY PART OF YOUR LEGAL OBLIGATION WOULD NOT EXCUSE FAILURE TO COMPLY IN ALL OTHER RESPECTS AND AS NEARLY AS POSSIBLE WITH THE OBLIGATIONS IMPOSED BY THE AFORESAID STATUTE, FINAL ORDER AND REGULATIONS ISSUED THEREUNDER. IT HAS BEEN FINALLY ADJUDICATED THAT THE COMMUNIST PARTY, USA IS A COMMUNIST ACTION ORGANIZATION AND THEREFORE MUST REGISTER ON OR BEFORE NOVEMBER 20, 1961.

J WALTER YEAGLEY ASST ATTY GEN INTERNAL SECURITY DIVISION.

10 1950 20 1961.

Government's Exhibit 11

(STIPULATION)

The parties hereto, by their attorneys, stipulate and agree as follows:

1. At no time up to and including December 1, 1961, the date of the return of the indictment, did the defendant file with the Internal Security Division of the Department of Justice a registration form, Form IS-51a, referred to in Section 11.200 of Order No. 250-61 of the Attorney General of the United States.

2. At no time up to and including December 1, 1961, the date of the return of the indictment, did the defendant file with the Internal Security Division of the Department of Justice a registration statement, Form IS-51, referred to in Section 11.201 of Order No. 250-61 of the Attorney General of the United States.

Dated, December 6, 1962.

Defendant's Requested Instruction No. 2

Counts I through XI of the indictment charge, in essence, that on each day from November 20, 1961 to November 30, 1961, inclusive, the defendant willfully failed to register with the Attorney General as a Communist-action organization. Count XII charges that the defendant willfully failed to file with the Attorney General a registration statement as required by the Subversive Activities Control Act.

It is the burden of the government to prove beyond a reasonable doubt not only that the defendant failed to register or to file a registration statement, but that the failure was willful as defined by law.

Defendant Requested Instruction No. 3

The requirement of willfulness means that the government must prove beyond a reasonable doubt that in failing to register and to file a registration statement, the defendant was acting with an evil purpose and without a justifiable excuse. If the evidence does not prove this evil purpose and absence of a justifiable excuse beyond a reasonable doubt, you must find the defendant not guilty.

Denied.

Defendant's Requested Instruction No. 3

The defendant is an unincorporated association and is charged as a legal entity. An unincorporated association can act only through its officers or agents. Accordingly, you cannot find that the defendant acted willfully in failing to register and to file a registration statement unless the evidence satisfies you beyond a resonable doubt that the authorized officers of the defendant acted willfully, as I have defined that term to you, in failing to register and file a registration statement for the defendant.

Denied.

Defendant's Requested Instruction No. 9

The defendant's letter of November 10, 1961 to the Assistant Attorney General stated that it was the conviction of the defendant and its officers that the defendant is not a Communist-action organization. If this was a truthful statement of the belief of the defendant and its officers, then the failure of the defendant to register by filing Form IS-51a was not willful or unlawful, and in that event the defendant is not guilty of the offenses charged in the first eleven counts of the indictment.

Denied.

Defendant's Requested Instruction No. 16

(Alternative prayer in event of denial of Requested Instruction 2)

It is the burden of the government to prove beyond a reasonable doubt not only that the defendant failed to register or to file a registration statement, but that each such failure was done with a criminal intent.

By criminal intent is meant that the defendant intended to act wrongfully or to violate the law in failing to register or to file a registration statement. If the defendant and its officers fail to register or to file a registration statement because they believed in good faith that they had a constitutional privilege or right not to do so, then the necessary element of criminal intent would be lacking.

Denied.

Judgment and Fine

(Filed December 18, 1962).

On this 17th day of December 1962 came the attorney for the government and the defendant by its attorneys, Joseph Forer and John Abt, Esquire.

It Is Adjudged that the defendant has been convicted upon its plea of not guilty and a verdict of guilty of the offenses of violation of Title 50 United States Code Sections 786, 794 as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no adequate cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant pay a fine of ten thousand dollars ($10,000) on each of counts one through twelve or one hundred and twenty thousand dollars ($120,000) in the aggregate.

s/ Alexander Holtzoff
United States District Judge

Notice of Appeal

(Filed December 26, 1962)

Name and address of appellant: The Communist Party of the United States of America, 23 West 26th St., New York City, New York.

Name and address of appellant's attorney: Joseph Forer, 711 14th St. N. W., Washington 5, D. C.

Offense: Failure to register and to file registration statement, in violation of 50 U. S. Code secs. 786 and 794.

Concise statement of judgment or order, giving date, and any sentence: Judgment of guilty on all counts, December 17, 1962. Sentence of $10,000 fine on each count, totalling $120,000.

The above-named appellant hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Excerpts from Docket Entries

1961

Dec. 1—Presentment and indictment filed (12 Counts).

• • •

1962

Jan. 1—Motion of Defendant to dismiss indictment, Affidavit, Exhibits A and B, Memorandum of Points and Authorities in support of motion to dismiss Indictment, filed. Motion of Defendant for Hearing on qualifications of Grand Jurors and Memorandum of Points and Authorities in support of motion for hearing on Qualifications of Grand Jurors, filed.

• • •

Jan. 5—Affidavit and Offer of Proof in support of (1) Paragraph 5 of motion to dismiss the Indictment, (2) Motion for hearing on qualifications of Grand Jurors, and (3) Challenge for cause to Petit Jurors and motion for hearing on qualifications, and Exhibit A, filed.

• • •

Oct. 12—Motion of Defendant for dismissal of indictment, heard and Denied; Motion of Defendant for hearing on qualifications of Grand Jurors, and Challenge for cause to Petit Jurors, Denied.

• • •

Dec. 11—Trial Begun.

• • •

Dec. 12—Trial Resumed.

• • •

Dec. 13—Trial Resumed.

• • •

Excerpts from Docket Entries

1962

Dec. 17—Trial Resumed.

* * *

Verdict: Guilty as charged; Sentenced to a Fine of $10,000.00 on each of counts one through twelve or $120,000.00 in the aggregate.

* * *

Dec. 18—Judgment and Fine of December 17, 1962, filed. Holtzoff, J.

* * *

Dec. 26—Notice of Appeal, Filed.

6-25-63

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

IN THE

United States Court of Appeals

For the District of Columbia

No. 17,583

COMMUNIST PARTY OF THE UNITED STATES,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
FILED MAY 9 1963
CLERK

O. JOHN ROGGE,
60 Broad Street,
New York, N. Y.,
Attorney for American Civil Liberties Union, Amicus Curiae.

MELVIN L. WULF,
of Counsel.

INDEX

Table of Cases Cited

Other Authorities Cited

IN THE

United States Court of Appeals

For the District of Columbia

No. 17,583

COMMUNIST PARTY OF THE UNITED STATES,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal From a Judgment of the United States District Court for the District of Columbia

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union, which files this brief with the consent of the parties,[a] is a private, non-partisan organization engaged solely in the defense of the Bill of Rights. We file this brief because we believe that the conviction of the Communist Party for failing to register under Section 7 of the Subversive Activities Control Act violates the Fifth Amendment's privilege against self-incrimination.

[a] The letters of consent are on file with the clerk of the Court.

INTRODUCTION

The Purpose of the Privilege Against Self-Incrimination Requires That the Privilege Be Construed So As to Invalidate the Conviction

Since the advent of the Cold War more than fifteen years ago, the First Amendment rights of political dissidents have been consistently narrowed. In a series of decisions such as those upholding the imposition of loyalty oaths,[1] legislative investigations,[2] Smith Act convictions,[3] and deportations,[4] the courts have not regarded the First Amendment as a bar to governmental action designed to eradicate Communist influence from American life. Essentially, the theory has been that the conspiratorial nature of the Communist movement and its purpose violently to overthrow the government, if necessary, renders the First Amendment rights of the Communist party and its members subordinate to the right of self-preservation of our Nation, especially in the face of what the Court itself regarded as a clear and present danger in *Dennis* v. *United States,* 341 U. S. 494.

Congressional investigations of Communists—past, present and imaginary—travellers are still being carried on, members of the Party have been prosecuted under the membership clause of the Smith Act, and the government is attempting in the instant case and others to enforce the Subversive Activities Control Act. Under these circumstances, what role should the Fifth Amendment play in guaranteeing that no person shall be compelled to incriminate himself?

The origins of the self-incrimination clause brightly illuminate the path to its proper application in this case.

---

[1] *Adler* v. *Bd. of Education,* 342 U. S. 485; *Garner* v. *Board of Public Works,* 341 U. S. 716; *Lerner* v. *Casey,* 357 U. S. 468.

[2] *Barenblatt* v. *United States,* 360 U. S. 109.

[3] *Dennis* v. *United States,* 341 U. S. 494.

[4] *Harisiades* v. *Shaughnessy,* 342 U. S. 580.

Although the beginnings of the privilege can be traced back more than seven hundred years to the resistance of the English people to the pursuit of heresy, the privilege was largely nurtured in seventeenth century England when the Puritans were humiliated by means of Star Chamber and High Commission proceedings, as well as the use of the feared and despised ex officio oath. Eventually, there was a general rebellion against the oath because of the belief that one should not be forced to accuse oneself and one's associates. By the time John Lilburn was tried in 1638 for refusing to take the oath, the privilege against self-incrimination had been firmly established as a weapon against political and religious persecution.

History thus establishes the intimate connection between the privilege and First Amendment rights. Dean Griswold of Harvard Law School has underscored this relationship:

> "I would suggest * * * that in a number of cases in which the Fifth Amendment has been claimed, the underlying reason, and perhaps the sound reason, is more closely connected with the First Amendment than with the Fifth. In many cases, the Fifth Amendment has been used, perhaps erroneously, as a protection of free speech and free assembly. * * * Where matters of man's belief, or opinions or political views are essential elements in the charge, it may be most difficult to get evidence from sources other than the suspected or accused person himself. Hence, the significance of the privilege over the years has perhaps been greatest in connection with resistance to prosecution for such offenses as heresy or political crimes. In these areas the privilege against self-incrimination has been a protection for freedom of thought, and a hindrance to any government which might wish to prosecute for thoughts and opinions alone. * * * " Griswold, *The Fifth Amendment Today,* 8-9, 61 (1955)

Unfortunately, the privilege today is often relegated to the category of a protective device or escape mechanism

for the common criminal. Forgotten is the fact that the final struggle for its successful establishment resulted from the resistance by the Puritans to informing against themselves and fellow Puritans.

The Issues

The Fifth Amendment issue in this case is divisible into two questions: first, does forcing the Communist Party to register violate the self-incrimination clause of the Fifth Amendment by requiring the individual who must sign the IS-51a registration form, and the IS-51 registration statement, to incriminate himself; second, does forcing the Communist Party to list its members and officers, and supply various information about them, violate the privilege against self-incrimination of the members and officers?

The Facts

When Congress enacted the Subversive Activities Control Act in 1950, it was seriously concerned that certain provisions of the Act could not be applied without violating the Fifth Amendment's prohibition against compelling self-incrimination. In *Scales* v. *United States*,[6] the Supreme Court described this concern and the efforts of Congress to meet the Fifth Amendment problem, efforts which culminated in what is now Section 4(f) of the Act.[7] Although the legislative history does not need detailed repetition, it should be noted that there were dissenters, in the Congress and elsewhere, who questioned whether some of the regis-

---

[5] See, Pitman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763 (1935); Rogge, *The First and the Fifth*, 146-177 (1960); Griswold, *The Fifth Amendment Today*, 8-9, 61 (1955).

[6] 367 U. S. 203.

[7] To be discussed *infra*.

tration provisions of the Act could be constitutionally enforced.[8]

When the order of the Subversive Activities Control Board requiring the Party to register first came before this Court in 1954,[9] the self-incrimination issue was not clearly decided, although the Court did uphold the order under the First Amendment. Judge Bazelon, in a dissenting opinion, declared that the registration order violated the Fifth Amendment:

> "Suppose an Act of Congress required bands of bank robbers to file with the Attorney General statements of their membership and activities, and imposed criminal penalties upon their leadership and members for failure to do so. Such an Act would compel individuals to disclose their connection with a criminal conspiracy. No argument could reconcile such an Act with the Fifth Amendment's command. * * * The registration provisions * * * are similar." [10]

On appeal, the Supreme Court also upheld the order under the First Amendment but did not pass on the self-incrimination claim.[11] Four justices dissented, and each of them asserted that the order was invalid under the privilege against self-incrimination. In *Scales* v. *United States*,[12]

---

[8] These included Senators Lehman, Kefauver, Humphrey, and Douglas, and Congressman Celler. See *Scales* v. *United States*, 367 U. S. 203, 212-219, 279-286.

Apart from the Congress, the Justice Department had doubts about the constitutionality of those registration provisions which require members of the Party to register if the Party fails to register them. 96 Con. Rec. 14479-480. The late John W. Davis also doubted whether such provisions could be enforced without an adequate immunity grant. S. Rep. No. 1358, 81st Cong., 1st Sess., pp. 43-44.

[9] *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531.

[10] *Id.* at 576.

[11] 367 U. S. 1.

[12] 367 U. S. 203.

the five Justices who comprised the majority in the registration case expressed their belief that the registration provisions of the Act presented grave constitutional difficulties. It is in this context that the Court must now rule.

ARGUMENT

The conviction of the Communist Party for failure to register must be reversed because the registration provisions of the Act and the regulations promulgated thereunder violate the privilege against self-incrimination of the individuals who must sign the registration form and statement and of the members and officers of the Communist Party.

(a) Filing of the registration form IS51a, cannot be compelled without violating the privilege against self-incrimination of the individual who must sign it.

Either an officer of the Communist Party or a person authorized by the Party must sign the registration form (J.A. 57-59, 63). If an officer of the Party signs it, subscribing his title, he makes an incriminating admission. *Blau* v. *United States,* 340 U. S. 158; *Quinn* v. *United States,* 349 U. S. 155; *Scales* v. *United States,* 367 U. S. 203.

The Attorney General's new regulations permitting an agent, other than an officer of the Party, to sign the registration form, do not remove the constitutional objections to enforced registration. By signing the form, the agent admits affiliation with the Party, thereby incriminating himself. *Blau* v. *United States, supra; Emspak* v. *United States,* 349 U. S. 190:

> "To sustain the privilege, it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be an-

swered might be dangerous because injurious disclosure could result." *Hoffman* v. *United States*, 341 U. S. 479, 486-87.

An admission of affiliation with the Party—"a Communist-action organization"—is clearly an "injurious disclosure." The admission might well furnish a link in the chain of evidence needed to prosecute the agent for a federal crime, ranging from conspiracy to violate the Smith Act to a violation of Section 4(a) of the Act.

It is immaterial that this admission of affiliation might be able to be explained away "on some innocent basis unrelated to Communism." *Emspak* v. *United States.*[13]

This admission also constitutes a waiver of the privilege in regard to related matters, *Rogers* v. *United*, 340 U. S. 367, and thereby makes it possible for the government to extract from the agent the names of the officers who authorized him to register the Party.

(b) Filing of the registration statement IS-51, cannot be compelled without violating the privilege against self-incrimination of the individual who must sign it, and of the officers and members of the Party.

The registration statement must be signed by an officer of the Party or a person authorized by the Party to file the statement. Just as the provisions for signature of the registration form violate the self-incrimination privilege of the signatory, the requirements for filing the registration statement are similarly repugnant.

When the registration statement is filed, every officer and member of the Party, in addition to the person who signs the statement, is incriminated. The statement compels disclosure of the names, aliases, and addresses of all the Party's members and officers, the amounts and purposes

[13] Cf. cases cited in *Emspak* v. *United States, supra,* at 201, n. 24, upholding the assertion of the privilege to questions which require disclosure of the witness' affiliations and associations.

of the Party's expenditures, and the number, nature and location of its printing presses, mimeograph machines and the like. Thus, in addition to compelling the officers and members to disclose their affiliation with the Party to the government through an officer or agent, the statement requires them to furnish the government with information which could be used against them if they were to be prosecuted under Section 4(a) of the Act, or under the Smith Act (18 U. S. C. § 2385).

The fact that the privilege against self-incrimination is a personal privilege which cannot be asserted to protect another individual, does not weaken or impair the argument for reversal of conviction in this case; indeed, it supports it. For the government is attempting to force the members and officers of the Party to incriminate themselves by furnishing, through the medium of the Party or an agent thereof, their identities, aliases, and various other incriminating information. The government could not require officers and members to provide it with this information directly. Thirteen years ago, the Justice Department ruled this out as being violative of the Fifth Amendment. 96 Cong. Rec. 14479. The government should not be allowed to accomplish this objective by inserting the artificial, juridical personality of the Party between it and the Party's members and officers.

The cases of *Hale* v. *Henkel*, 201 U. S. 43, and *Rogers* v. *United States*, 340 U. S. 367, are not to the contrary. They merely assert that one person or business association may not refuse to disclose information which would incriminate another. Only if the government were attempting to subpoena the Party's records would these cases be applicable. Here, the members and officers are themselves being forced to provide information to the government which may have no connection with the Party's books and records. To require such information to be provided in the name of the Party would be to evade the Fifth Amendment. The

privilege against self-incrimination "must have a broad construction in favor of the right which it was intended to secure." *Counselman* v. *Hitchcock,* 142 U. S. 547.

(c) The Party's claim of the privilege on behalf of its officers, members and agents is the only means by which it can be asserted.

The privilege against self-incrimination must "normally be claimed by the individual who seeks to avail himself of its protection." *Communist Party* v. *SACB,* 367 U. S. 1, 107. This was done by the Party on behalf of its officers and members in the letter of November 10, 1961, sent to the government (J.A. 71). The Party claimed the privilege on behalf of its officers and members because this was the only way the privilege could be exercised without disclosing the incriminating information demanded by the government.

Where individuals have an identify of interest, one may claim a constitutional protection for the other if disclosure of the real claimant would destroy his protection. *NAACP* v. *Alabama,* 357 U. S. 449.

In the *NAACP* case, the National Association for the Advancement of Colored People was allowed to assert the right of its members to freedom of association, in opposition to an Alabama court order demanding disclosure of the names of its members. The Supreme Court said:

> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. To require that it be claimed by the members themselves would result in nullification of the right at the very moment of assertion. Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical." At 459.

This case is controlling, since a direct claim of privilege by the officers and members of the Party would be nullified at the moment of its assertion,[14] and since the Party and its members and officers are in every practical sense identical.

This is equally true in regard to the privilege of whatever representative the Party might choose to sign the registration form and statement as a substitute for its officers.

(d) Section 4(f) of the Act does not grant immunity co-extensive with the possibility of prosecution to which the registrant is exposed.

Section 4(f) provides that:

> "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute.
>
> The fact of registration of any person * * * as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute."

This is clearly an inadequate substitute for the constitutional privilege against self-incrimination.

Counselman v. *Hitchcock*, 142 U. S. 547, stands for the proposition that incriminating testimony may be compelled only in exchange for complete immunity from prosecution for the matters to which the testimony relates; that a provision which merely provides that the compelled testimony may not be used against the witness is insufficient. Such a

---

[14] Compare those cases which hold that a witness cannot be compelled to reveal why an answer might incriminate him if the explanation would reveal the incriminatory information. *Hoffman* v. *United States*, 341 U. S. 479, 486.

provision does not prevent the use of the compelled testimony to obtain other evidence which may be used against the witness.

Scales v. *United States*, 367 U. S. 203, must be considered in a reading of that part of Section 4(f) which provides that neither the holding of office nor membership in a Communist organization shall *per se* constitute a crime. In *Scales*, the Court held that membership in the Communist Party was punishable under the membership clause of the Smith Act, regardless of Section 4(f).[15]

(e) There is no authority for upholding the conviction against a claim of the privilege against self-incrimination.

Although *United States* v. *White*, 312 U. S. 694, has been said to control the disposition of a claim of the privilege against self-incrimination in connection with Section 7 of the Act,[16] analysis of that case shows it to be inapplicable. In *White*, an officer of a labor union was required to produce records of the union. Under the Act, no records are demanded. Rather, the registration order requires the preparation and filing of original statements containing information which is not necessarily in the Party's books and records, assuming any exist.

The case which is controlling is not *White*, but *Curcio* v. *United States*, 354 U. S. 118. There it was held that the custodian of a union's books and records, who had failed to produce them in a response to a subpoena, could assert the privilege against self-incrimination in response to questions

---

[15] A registrant would also be liable to prosecution under various other statutes, including the Act itself. See, *e.g.*, the Foreign Agents Registration Act, 22 U. S. C. § 612.

[16] This was the opinion of the Justice Department when the Act was under consideration, 96 Cong. Rec. 14479. See also, the opinion of the majority of this Court in *Communist Party* v. *Subversive Activities Control Board*, 223 F. 2d 531. It should be noted that these opinions were stated prior to the decision in *Curcio* v. *United States*, 354 U. S. 118.

relating to the whereabouts of the books and records. The Court held:

> "The compulsory production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, because he does not own the records and has no legally cognizable interest in them. However, forcing the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." At 128.

What the Court held and said in *Curcio,* applies with emphasis to the case at bar.

Conclusion

The privilege against self-incrimination, or right of silence as Justices Black and Douglas have appropriately called it, should be as effective for the protection of political dissidents today as it was for the Puritans more than three centuries ago. It is unbecoming a free people to compel individuals to be informers.

The judgment below should be reversed.

Respectfully submitted,

O. John Rogge,
60 Broad Street,
New York, N. Y.,
Attorney for American Civil Liberties Union, Amicus Curiae.

Melvin L. Wulf,
of Counsel.

May 9, 1963.